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In the Supreme Court of the United States

OCTOBER TERM, 1950

No. .....

SOUTHERN PACIFIC COMPANY, a corporation,

Petitioner,

vs.

GARRY T. GUTHRIE,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

To the Honorable Fred M. Vinson, Chief Justice of the United States, and to the Honorable the Associate Justices of the Supreme Court of the United States:

Respondent, Garry T. Guthrie, a Southern Pacific Company locomotive engineer, was run over by a locomotive at Sentinal, Arizona, on October 27, 1947, and lost his right leg above the knee. He brought this action against his employer, petitioner, Southern Pacific Company, in the United

States District Court for the Northern District of California, Southern Division, under the Federal Employers' Liability Act (45 U.S.C.A. §51ff),[1] claiming his injury resulted from negligence of petitioner. On the trial of the case the jury returned a verdict for respondent for $100,000. Motion for new trial upon the ground, among others, that the verdict was excessive was denied although the trial judge, in his order denying the motion, characterized the verdict as "large" and "larger than I might have awarded."[2] (R 71). On appeal to the United States Court of Appeals for the Ninth Circuit the court (two circuit judges and a district judge) rendered an opinion affirming the judgment[3] (R 352). **All three judges** concurred in a statement that "the amount of **the verdict is too high**" (R 371).[3a] Two of the judges thought nothing should be done about it. One judge dissented and said that affirmance should be conditional on a remittitur of $20,000[4] (R 375). Appellant (petitioner here) petitioned for a rehearing in bank restricted to the question of damages. The petition was granted, limited to the questions "whether the damages are excessive, and if so, what the action of the court should be."[5] (R 378). The appeal was reheard in bank, all seven circuit judges sitting (R 379). The Court of Appeals again affirmed the judgment, three judges dissenting. **All seven judges**

1. The applicable provisions of the statute are set out in Appendix B to this petition.

2. The trial judge's memorandum, opinion and order are set out in Appendix A to this petition, pp. 41ff.

3. The opinion is set out in Appendix A to this petition, pp. 1ff.

3a. Appendix A, p. 17.

4. This was Circuit Judge Pope, the author of the opinion (App. A., p. 20).

5. See Appendix A, p. 23.

agreed "that **the verdict was too high.**"[6] (R 384). Three judges thought that it was not so high that the Court should give relief. They voted to affirm the judgment. They also indicate some doubt of the power of a Federal appellate court to deal with an excessive award (R 380ff.). One judge specially concurred and said that an earlier decision of the court holding that in a proper case the Court of Appeals had power to affirm conditioned on a remittitur should be overruled[7] (R 398). Three judges dissented upon the ground that the verdict was so excessive that affirmance should be only upon condition of a remittitur (R 399ff.).

The result is that the amount of this verdict has been passed upon by nine Federal judges all of whom were willing to state, as a matter of judicial opinion, that the award to respondent is more than he is entitled to but still, unless this court gives relief, petitioner must satisfy the judgment. In the Court of Appeals three judges (one of whom earlier had expressed the contrary view) thought the award was not so high that relief should be given, three thought it was, and the judgment was affirmed by the vote of the seventh judge who thought the court had no power to consider the matter.

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6. The "majority" opinion stated that "the members of this court as now constituted are in agreement, as was the court on the former hearing, on two preliminary conclusions. The first of these is that the verdict was too high. The second is that there is no basis for any claim that the verdict was given under the influence of passion or prejudice." See Appendix A, p. 27.

7. *Cobb v. Lepisto,* 6 F.2d 128 (Circ. 9). See Appendix A, p. 38. To be consistent with his position that the court had no power to consider the question it would seem that Circuit Judge Bone should not have expressed an opinion that the verdict was too high but, apparently, from the statement in the "majority" opinion he joined in that statement. He had joined in a like statement in the first opinion.

The case presents these questions: (1) the proper function of the trial court in passing on a motion for new trial upon the ground that the verdict is excessive and the considerations which would guide its action; (2) the power of Federal appellate courts to review orders of trial courts denying motions for new trial upon the ground that the verdict is excessive; (3) the considerations which should guide Federal appellate courts, if they have such power, in the exercise of that power; (4) an aspect of the last, questions of the measure of damages, evidence of damage and the effect of the burden of proof.

This application is for a Writ of Certiorari so that this court can review the judgment of the United States Court of Appeals for the Ninth Circuit, in the exercise of this court's "power of supervision over the administration of justice in the Federal courts" (*Thiel v. Southern Pacific Company,* 328 U.S. 217, 225, 90 L.ed. 1181, 1187). In this behalf your petitioner respectfully shows:

I.

PROCEEDINGS BELOW AND JURISDICTION

Plaintiff's [respondent's] complaint was filed June 3, 1948 (R 2-5). Defendant [petitioner] answered August 21, 1948 (R 5-8). The case went to trial November 30, 1948 (R 79) the court sitting with a jury. At the close of all of the evidence defendant moved for a directed verdict. The motion was denied (R 314, 315). A verdict in favor of plaintiff for $100,000 was returned December 3, 1948 (R 20), and judgment on the verdict was filed December 4, 1948, and docketed December 6, 1948 (R 63, 64). On December 10, 1948, defendant served and filed its notice of motion for judgment notwithstanding the verdict and for a new

trial (R 65-70). Among the grounds for new trial specified were that the verdict was against the weight of, and contrary to, the evidence, the evidence was insufficient to sustain the verdict, the verdict was excessive, and against the weight of the evidence and not sustained by it in that it was excessive, and the verdict appears to have been given and was given under the influence of passion and/or prejudice (R 67, 68). The motions were denied January 5, 1949 (R 71, 72). The jurisdiction of the District Court is sustained by 45 U.S.C.A. §56 and Jud. Cod. §24(1) (28 U.S.C.A. §41(1) now 28 U.S.C.A. §1331).

On January 15, 1949, defendant perfected an appeal from the judgment to the United States Court of Appeals for the Ninth Circuit and filed its designation of record (R 72, 73). Its bond for $150,000 was approved and filed January 17, 1949 (R 74-76). The jurisdiction of the United States Court of Appeals for the Ninth Circuit is sustained by 28 U.S.C.A. §§1291, 1294, 2107 and Fed. Rules Civ. Proc., Rule 73.

On December 30, 1949, the United States Court of Appeals for the Ninth Circuit (Bone and Pope, Circuit Judges, and Black, District Judge) filed its opinion affirming the judgment (R 352). Judge Pope, writer of the opinion, dissented in part stating that the case should be remanded for new trial unless appellee remitted $20,000 and interest (R 375). The opinion is printed in Appendix A to this petition and is reported in 180 F.2d 295.

On January 27, 1950, petitioner (defendant and appellant below) served and filed in the Court of Appeals its petition for a rehearing restricted to the question of excessiveness of the verdict and the power of the Court of Appeals to deal with it and, because of the importance of the question of practice, requested a rehearing in bank.

The petition was granted (R 378), limited as we have indicated (p. 2 above) and the cause was reheard by the court in bank (R 379), the seven circuit judges of the court sitting. The opinions of the judges of the court on rehearing were filed January 15, 1951. They will be found in the record at pp. 380ff., are reproduced in Appendix A to this petition and will be reported probably in 185 F.2d or 186 F.2d. Circuit Judges Pope, Healy and Orr raised a doubt of the power of the court to deal with the excessiveness of the verdict, were of the opinion that the trend of decision was in favor of the existence of the power but found it unnecessary to resolve the doubt because if the power existed this was not a case for its exercise. On the last point Circuit Judge Pope had changed the view expressed in his earlier opinion. Circuit Judge Bone concurred in affirmance of the judgment and said that the court should specifically overrule an earlier decision holding that it had power to deal with an excessive verdict (see note 7 above). Circuit Judges Denman and Stephens, each writing a separate opinion, and Circuit Judge Matthews concurring in both dissenting opinions, dissented on the ground that the verdict was so excessive that it should be dealt with by the Court of Appeals. Circuit Judge Denman, in his opinion, said:

> "From our conference it is clear that we can agree on a minimum sum to be remitted from the verdict as a condition for not requiring a new trial." (R 399; App. A, p. 39.)

This petition is filed agreeably to Rule 38 of the Rules of this court. It is believed that the jurisdiction of this court is sustained by §§1254 and 2101(c) Code on Judiciary and Judicial Procedure (28 U.S.C.A. §§1254, 2101(c); cf. *Affolder v. New York etc. R. Co.*, 339 U.S. 96, 94 L.ed. 683).

II.

SUMMARY STATEMENT OF THE CASE

The facts, in most respects, are sufficiently stated in Judge Pope's original opinion (R 352 ff.; App. A, 1 ff.). We do not now question the holding below that there was evidence to sustain a finding of negligence of petitioner. But with the comparative negligence rule under the Federal Employers Liability Act (45 U.S.C.A. §53, App. B), "damages and contributory negligence are so blended and interwoven, and the conduct of the plaintiff at the time of the accident is so important a matter in the assessment of damages" (*Norfolk S. R. Co. v. Ferebee*, 238 U.S. 269, 273, 59 L.ed. 1303, 1305; cf. *Gasoline Products Co. v. Champlin Ref. Co.*, 283 U.S. 494, 500, 75 L.ed. 1188, 1191) that some brief amplification as to respondent's conduct is appropriate.

Respondent was deadheading from Gila Bend west to Yuma, Arizona, through Sentinal, Arizona. At Sentinal he left a freight train which he had been riding to wait for a following passenger train, No. 5. No 5 came into Sentinal along a side track. To proceed it was necessary to pass over a switch at the west end of the side track to the mainline. Respondent undertook to facilitate the move by "lining" the sidetrack switch for the mainline.

The switch, a standard switch, was made of two outer fixed rails, the stock rails, and two inner movable rails, the points. At the tip of the points there is substituted for the normal track tie one that is larger and considerably longer, the head block. The head block extended several feet north of the tracks. So that the two points would move together to line the switch for one track or the other they were connected to each other by tie bars. The No. 1 tie bar was

just east of the head block, and substantially parallel to it. An arm of the No. 1 tie bar extended north under the north stock rail and was bolted to the connecting rod that went to the switch stand located at the north end of the head block. In the switch stand was the lever by which the switch was operated (R 123 ff., 165 ff., 238 ff., 272 ff. and photographs and diagrams in evidence).

When respondent determined to line the switch he was on the south side of the track. It was necessary to cross to the switch stand on the north side. He was an experienced man,[8] his experience included handling of switches (R 117, 118) and he had handled this very switch (R 170). He was familiar with the details of its construction and operation (R 123 ff., 159 ff.). He crossed the track to the west of the switch "because I remember that **I didn't walk across those bars and things, and I didn't want to walk across them, you see, because I tried to stay clear of them.**" (R 160).

When respondent got to the switch No. 5 was 450-500 feet to the east. He waited for it to move closer (R 157, 158). It had two headlights (R 151). He indicated both were burning (R 110, 111). The least that can be said is that **one headlight was on at full or bright and was giving a steady light straight ahead.** It would show a man at a distance of 800 feet. The light fanned out to the side of the track (R 116, 152, 164, 177).

No. 5 was moving so slowly that he could not tell whether it was moving (R 159). He unlocked the switch and threw it. He estimated that No. 5 was then 150 to 200 feet away (R 115). The fireman, O'Brien, respondent's witness, esti-

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8. He had railroaded before he hired out with petitioner as a fireman 24 years before his injury. He was promoted to engineer in March, 1941 (R 99, 100).

mated that it was 70 feet from the switch points (R 186). No. 5 was in fact moving, very slowly (R 184, 185, 188, 196)[9] but so slowly that respondent could not tell **for sure** whether it was moving (R 115-117).

After he had lined the switch respondent **gave the customary "come-ahead" arm signal to No. 5** (R 83, 133, 120, 178,[10] 185, 194, 195). Acting on this signal the train continued. When plaintiff gave the signal he started to cross the track from north to south in front of the train. **As he did so he moved out of sight of the engine men of the locomotive**—the locomotive is so constructed that they cannot see anything low and immediately ahead[11] (R 84, 165, 185, 195).

Instead of recrossing the track to the west of the switch in the clear of the switch ("those bars and things") respondent took his first step over the track just back of the tip of the switch points **where he could not avoid the No. 1 tie bar.** His foot went between the tie bar and the head block and was caught. He selected a point to cross that was never intended as a path and the only point of danger. He knew this. No condition of darkness contributed. The track and switch were bathed in the headlight of the locomotive which was on full shining steadily down the track (R 152, 172, 177, 180).

The court below determined that the evidence supported a finding of negligence in two respects:

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9. Testimony of the fireman O'Brien, and Engineer Tevis, witnesses for plaintiff.

10. That was "the signal to the engineer to move up onto the main line"; "a signal to him that the switch was properly lined."

11. Compare the photographs of the locomotive. See R 148 et seq. Plaintiff had operated locomotives of this type and knew he was out of sight (R 148 et seq., 165).

1. Although the ballast between the head block and the No. 1 switch tie, under the No. 1 tie bar, is always lower than elsewhere, so that the tie rod can move freely, the ballast at this particular point was lower than normal. This in no way contributed to respondent putting his foot between the tie bar and the head block and it is not clear how it could have contributed to the foot being held.

2. The fireman of the locomotive of No. 5 had crossed the cab to the engineer's side and gone down to the ground for the purpose of going ahead to line the switch. When he saw Guthrie line the switch he stopped, waited for the gangway ladder to roll up to him, got back up in the cab, crossed to his side, looked ahead to see if Guthrie had crossed the track, did not see him, recrossed to the engineer's side and then discovered that Guthrie had been run over. The theory of negligence here is that if as soon as the fireman crossed the cab back to his own side and saw that Guthrie had not crossed the track he signaled the engineer to stop the accident might have been avoided.

Acceding to the conclusion that petitioner was guilty of negligence in these respects, we cannot accede to the further conclusion that respondent was not guilty of contributory negligence as matter of law.[12]

Respondent's right foot was caught. He threw his left leg and body back over the north rail. The locomotive ran over his right leg above the knee. He was taken to Yuma, was operated on twice and was in the hospital 37 days until he was up on crutches (R 129ff., 190ff.).

At the time of the accident respondent was 58 years and

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12. The court refused to submit a special interrogatory to the jury on this question (R 53).

10 months old (R 136, 164). His life expectancy was 14.9 years. He was subject to compulsory retirement at 70 (R 312). His work expectancy as a locomotive engineer was 11 years.

In the loss of his leg respondent suffered an admittedly serious injury. There is little beyond this bald fact. His convalescence was without incident. He seems to have made a fairly rapid recovery. At the time of the trial he was suffering some discomfort, in part due to a congenital anomaly in his back. He had some "phantom pain" but this is the usual incident of the loss of a limb. A contracture interfered with the use of an artificial leg but there was no reasonable certainty that he would not be able to wear an artificial limb.[13]

The court below concluded that of the award approximately $60,000 should be attributed to the present value of loss of future earnings. It arrived at this figure as follows:

1. The maximum possible earnings shown by the record should be taken. In finding this the jury were entitled to take into consideration raises in pay for railroad engineers after the time respondent was injured, and to assume that of the various rates applicable to railroad engineers (they vary according to the weight of the power being handled) a calculation based on the highest could be taken.

2. From this should be deducted income taxes withheld.

3. It could be assumed that respondent would maintain maximum earnings for his full working expectancy, but

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13. See Circuit Judge Pope's summary in his first opinion (R 370, App. A, p. 16) and testimony of a physical called by respondent (R 217ff.). There is no suggestion of unusual complications.

for this accident. (Common knowledge is to the contrary.[14])

4. It was next assumed, without any evidence except the injury, that respondent's injury produced **total** incapacity and, accordingly, computation should be made on the basis of **total loss of earning capacity.**

5. On these assumptions the present worth of the loss of future take-home pay is $55,515.74, on a 3% basis.

6. Although it is proper to compute on the basis of take-home pay and hence to reduce gross prospective earnings by income tax payable, there is such uncertainty about income tax in the future that an increase in this figure can be made and it is proper to assume $60,000 as the present value of lost future earnings and the amount attributable to loss of earning capacity.

$40,000, the remainder of the award, is attributable to pain, suffering, humiliation, etc.

The court in making its calculations assumed a 3% rate of interest. Respondent did not introduce any evidence of the proper rate to be used. There was no evidence that respondent would maintain his highest rate of earnings for his full working expectancy. In the nature of things there could be no such evidence to contradict the teaching of common experience. There was no evidence to support an assumption that respondent's injuries produced total incapacity, unless the mere fact of loss of a leg warrants the assumption.

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14. *Littman v. Bell Tel. Co.*, 315 Pa. 370, 172 Atl. 687, 690, col. 1.

III.

QUESTIONS PRESENTED AND REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

This basic question is presented: Have Federal appellate courts the power to reverse a judgment and order a new trial absolutely, or conditionally i.e., unless there be remitted from the judgment an amount stated, in an action for personal injuries or any other action where the damages are unliquidated and not susceptible of mathematical computation, where the jury has awarded an amount which is "grossly excessive" or "monstrous"? Have Federal appellate courts the power to review the order of the trial judge denying a motion for new trial in such a case where the motion should have been granted absolutely, or conditionally, and the denial amounts to an abuse of discretion?

These are questions upon which the decisions of the courts of appeal are in conflict. See, holding there is such power, *Cobb v. Lepisto*, 6 F.2d 128 (Circ. 9); *Department of Water & Power v. Anderson*, 95 F.2d 577 (Circ. 9); *Estabrook v. Butte etc. Ry. Co.*, 163 F.2d 781 (Circ. 9); *Virginian Ry. Co. v. Armentrout*, 166 F.2d 400 (Circ. 4); *United States v. Certain Parcels of Land*, 149 F.2d 81 (Circ. 5); *Texas Co. v. Christian*, 177 F.2d 759 (Circ. 5). Holding there is no such power see *Scott v. Baltimore & O. R. Co.*, 151 F.2d 61 (Circ. 3); *Reid v. Nelson*, 154 F.2d 724 (Circ. 5); *Chicago & N. W. Ry. Co. v. Green*, 164 F.2d 55 (Circ. 8); *Herzig v. Swift & Co.*, 154 F.2d 64 (Circ. 2); *St. Louis etc. Ry. Co. v. Ferguson*, 182 F.2d 949 (Circ. 8).[15] It is hard to say that the case at bar decides the question

15. These cases are by way of example. There is no pretense that this listing remotely approaches being exhaustive.

except in the limited sense that the deciding vote for affirmance was the vote of a judge who was of the opinion that the court did not possess the power. The case also presents an unresolved conflict among the judges of the Ninth Circuit, one being of the opinion that the power did not exist, three being of the opinion that it did exist and three raising a doubt which they did not resolve.[16]

The question is an important question of Federal law, and of the administration of justice in the Federal courts, which has not been, but should be, settled by this court unless it can be said that it has been settled by this court in *Affolder v. New York, Chic., etc. Ry. Co.*, 339 U.S. 96, 94 L.ed. 683. If it can be said that that case settled the question then in the case at bar the deciding vote was cast by a circuit judge whose opinion was in conflict with the holding of that case.

The holding of the *Affolder Case* is, with deference, not as clear as it should be. In that case the Court of Appeals for the Eighth Circuit declined to consider the question of excessiveness of the award saying simply "the assignment of error that the verdict is excessive is not properly addressed to this court." (*New York, Chicago etc. Ry. Co. v. Affolder*, 174 F.2d 486, 493 (Circ. 8).) This court did consider the assignment but declined to disturb the award because the amount was "not monstrous in the circumstances of this case." Thereafter the same court of appeals in *St. Louis etc., Ry. Co. v. Ferguson*, 182 F.2d 949, 954 (Circ. 8) reaffirmed the rule as it had stated it in the

16. It will result that in this circuit, if Circuit Judge Bone is one of the three judges who sits, and the other two disagree whether relief should be given it will be denied by the vote of a judge who will not consider the merits.

Affolder Case and undertook to explain away the decision of this court on the ground that this court proceeded on a misapprehension of what the court of appeals had done. With this conclusion Judge Pope and the two judges who agreed with him in the case at bar disagreed in terms and, presumably, the three dissenting judges also disagreed. There is a conflict between the circuits as to the meaning and effect of this court's decision in the *Affolder Case.*

The case at bar presents these questions: The proper measure of damages under the Federal Employers' Liability Act, for personal injury, the considerations which should guide the trial court in passing on a motion for new trial on the ground a verdict is excessive, and which should guide a court of appeals in determining whether it is so grossly excessive that the court of appeals should give relief, if it has power to consider that question, and the proper elements to be considered in determining what damages properly can be awarded. These questions have been passed on by this court in actions for wrongful death under the Federal Employers' Liability Act (*Chesapeake & O. Ry. Co. v. Gainey,* 241 U.S. 464, 60 L.ed. 1124; *Chesapeake & O. R. Co. v. Kelly,* 241 U.S. 485, 60 L.ed. 1117 and cf. *Michigan C. R. Co. v. Vreeland,* 227 U.S. 59, 57 L.ed. 417; *American R. Co. of Porto Rico v. Didricksen,* 227 U.S. 145, 57 L.ed. 456; *Garrett v. L. & N. R. Co.,* 235 U.S. 308, 59 L.ed. 242; *St. Louis, etc. Co. v. Hesterley,* 228 U.S. 702, 57 L.ed. 1031; *Taylor v. Taylor,* 232 U.S. 363, 58 L.ed. 639; *St. Louis etc. Co. v. Craft,* 237 U.S. 648, 59 L.ed. 1160; *Chicago B. & Q. R. Co. v. Wells-Dickey Trust Co.,* 275 U.S. 161, 72 L.ed. 216; *Union P. R. Co. v. Hadley,* 246 U.S. 330, 62 L.ed. 751) but not in an action for personal injuries except the con-

clusion stated in the *Affolder Case*. The Federal Employers' Liability Act, unlike other statutory workmen's compensation scheme, places administration of the statute designed to afford compensation, in a proper case, for injuries suffered by railroad workers in the hands of the Federal courts and juries. What should be awarded—how it should be measured and the elements to be considered—presents important Federal questions not only as a matter of law but as an economic matter, upon which the courts of appeals in supervising the administration of the statute should not be left without guides. The amounts involved are staggering. The payments made are a cost of railroad operation ultimately passed on to the public through freight and passenger rates. The public has a large, if not fully appreciated, interest. There is no need to present statistics. This court, from its experience in passing upon petitions for certiorari in cases under the Federal Employers' Liability Act is aware of the number of such cases. This case and the *Affolder Case* are not isolated instances of the very large amounts involved.

These questions, aspects of the last, are presented:

1. Where the plaintiff has the burden of proof and presents no evidence that his permanent disability has created a total incapacity for economic productivity is the court, merely because of the loss of a leg, entitled to assume **total** loss of earning capacity? For almost precisely the same injury, but a younger man, the trial court in the *Affolder Case* based its calculation on a 60% loss of earning capacity. This seems liberal enough.

2. Where, as in this case, the award is not subject to income tax (26 U.S.C.A. §22(b)(5)), the burden is on plain-

tiff to present evidence of earning capacity and the only evidence is of earnings, is the proper basis of calculation earnings before income tax or after income tax, i.e., take-home pay. The opinion in this case reflects some uncertainty, if not actual conflict between the circuits. If the proper figure is take-home pay then in making calculations should an unascertained variable above what the calculation shows be introduced in favor of the party having the burden of proof because of speculative future uncertainties? Must not the court restrict itself to a consideration of the only evidence before it and not indulge in speculation? If it is to speculate is not the only appropriate speculation that income taxes will increase? If a court is dealing with a work expectancy of only 11 years is it entitled to ignore the realities of the times?

3. In the absence of any evidence can the court assume, in favor of the party having the burden of proof and against what is common knowledge, that a man engaged in the trying work of a railroad engineer, with all its normal hazards, will maintain his peak earning power to the very limit of his working expectancy?

4. Lurking in the case, mentioned in the court's first opinion but not in the second opinion, as a consideration for sustaining the award, at least as compared with awards made in the past, is judicial notice of the depreciated value of the dollar. This may be a proper consideration when applied to that part of an award representing damages for "pain and suffering." But the opinion here apparently used this factor, as has been done by other courts, somewhat indiscriminately and applied it to the award as a whole. To do this fails to discriminate between an award

for pain and suffering and an award—and on the court's theory in this case the major part of the award—for loss of earning capacity. The basis of the award for loss of earning capacity, in this case, as in other cases, is past performance—earnings in the past. **The adjustment for the decreased purchasing power of the dollar has been made already in fixing those earnings.** Indeed, in the case at bar, proof was permitted of raise in wages after respondent was injured. Stated a little differently proof of earning capacity is made by proof of earnings and if the earnings are in depreciated dollars this shows no more than that the earning capacity was not as high as that number of dollars might have indicated years ago. The only measure provided is in terms of depreciated dollars. This matter, as one of judicial notice, and as one of instructing juries has given Federal trial courts difficulty. There is much confusion. This court should speak.

WHEREFORE, it is prayed that this court issue its writ of certiorari to the United States Court of Appeals for the Ninth Circuit and that the cause be brought here for review and determination.

Dated at San Francisco, California, February 21, 1951.

ARTHUR B. DUNNE
Attorney for Petitioner Southern Pacific Company, a corporation.

(Supporting brief and appendices follow)

In the Supreme Court of the United States

OCTOBER TERM, 1950

No. .....

SOUTHERN PACIFIC COMPANY, a corporation,
Petitioner,

vs.

GARRY T. GUTHRIE,
Respondent.

Brief in Support of the Foregoing Petition

I.

OPINIONS BELOW, JURISDICTION AND STATEMENT OF THE CASE

The memorandum opinion and order of the trial court denying the motion for new trial has not been reported. The first opinion of the Court of Appeals for the Ninth Circuit is reported in 180 F.2d 295. The opinions on rehearing have not been reported and probably will be reported in 185 F.2d or 186 F.2d. The original opinion of the Court of Appeals

is in the record at pages 352 ff. and the opinions on rehearing at pages 380 ff. All these opinions are reproduced in Appendix A hereto.

A statement of the grounds on which the jurisdiction of this court is invoked is in the last paragraph of Part I of the foregoing petition (p. 6, above). It is not repeated but is here referred to.

A statement of the case is made in Part II of the foregoing petition. It is not repeated but is here referred to.

II.

SPECIFICATION OF ERRORS

The errors intended to be urged are:

1. The trial court erred and abused its discretion in denying petitioner's motion for a new trial on the ground the verdict was excessive and committed errors of law, as demonstrated by its calculations, in passing on the motion for new trial, by (a) assuming that in determining loss of earning capacity a proper basis was past earnings without deduction of income taxes, (b) by calculating present interest on an assumption of a rate of interest which was too low, (c) by assuming maximum earnings for respondent's full working expectancy, (d) by assuming total disability and (e) by disregarding contributory negligence.

2. The Court of Appeals for the Ninth Circuit erred in not reversing the order of the trial court denying petitioner's motion for a new trial, in not holding that the damages awarded were grossly excessive and excessive as matter of law and in affirming the judgment absolutely and not reversing the cause for a new trial absolutely or unless respondent filed a remittitur in an appropriate amount upon

the ground and for the reason that the amount awarded was "monstrous," "grossly excessive" and unsupported by the evidence as matter of law; and the court erred in not holding that the trial court abused its discretion in denying petitioner's motion for a new trial for the reasons aforesaid and on the grounds stated in assigning error on the part of the trial court.

The questions raised and intended to be argued are those stated in Part III of the foregoing petition and are not here repeated but are referred to.

III.

ARGUMENT

This court does not sit to write academic essays but to decide concrete cases. There is, then, at the outset a preliminary question: Is the ultimate result in this case controlled by the result in *Affolder v. New York, Chicago, etc., Co.*, 339 U.S. 96, 94 L.ed. 683, where an award of $80,000 for the loss by a railroad switchman of his right leg above the knee was sustained. The briefest comparison of the cases shows that it is not controlling. The facts, as they bear on the question of excessiveness of the verdict, are not stated in the opinion of this court or in the opinion of the Court of Appeals for the Eighth Circuit (which declined to consider the question) and are taken from the opinion of the trial court in passing on the motion for new trial, reported in 70 F. Supp. 365. The verdict was for $95,000. The trial court denied a motion for new trial conditioned upon remission of $15,000. This was done. Plaintiff was 35 (p. 367) with an expectancy of 37 years plus (p. 369). The stump left by the amputation was only about 4 inches long.

Since the injury his leg "had given him constant pain" and he lost some 30 pounds in weight. If he were to wear an artificial limb at all it would be necessary to operate again, shorten the bone and remove scar tissue (to relieve pain and make a proper stump) and rather than assurance of success there was grave doubt that he would ever wear an artificial limb. The flexion of the limb was markedly reduced. "He was earning approximately $400 per month" (p. 367). Using standard annuity tables, if earnings of $4,800 per year be assumed, an expectancy of 37 years be assumed and total loss of earning capacity be assumed, on a 3% basis (the basis used in the case at bar) the present value of loss of earnings alone is well over $100,000. The court refused, however, to assume total loss of earning capacity and assumed a 60% loss of earning capacity. This seems liberal. On this basis it calculated present value of loss of future earnings, i.e., loss of earning capacity, at $70,000 leaving $10,000 for all of the other elements which were as fully present in that case as in the case at bar, and for a life expectancy of 37 years as against a life expectancy of less than 15 years in the case at bar.

Were the same method applied in the case at bar, even if we assume that the present value of Guthrie's loss of earnings on the basis of assumed total disability is $60,000 and not $55,515.74 the proper award for 60% loss of earning capacity would be $36,000. This would mean that in the case at bar $64,000 had been awarded for pain, suffering, humiliation, etc., as against $10,000 in the *Affolder Case*. Even in the figures used by the Court of Appeals in the case at bar the allowance for this element is $40,000 for less than a 15-year expectancy in the case of Guthrie,

as against $10,000 for a 37-year expectancy in the case of Affolder.

Difference in age is so great that the cases are not fit subjects of comparison. Difference in treatment by the court of the element of disability and consequent apportionment of amount for loss of earning capacity makes it apparent that the *Affolder Case* is not controlling here. If the same reasoning were applied here as was applied in the *Affolder Case* the judgment in the case at bar must be reduced to something under $46,000 ($36,000 for injury to earning capacity and $10,000 or less for other elements).

Since the function of a petition for certiorari is to expose the existence of questions warranting consideration by this court, and not primarily to demonstrate that the court below was wrong (although, of course, it would only be in exceptional cases when this court would review decisions which were clearly right) we believe that we can rest on what has already been said for the preliminary proposition that the amount of the award in this case is so high as to warrant a review to determine its propriety. It is believed enough that all of the judges of the court below said "it was too high," and that three of them would have given some relief, to indicate that our complaint of the result is not frivolous.[1] We pass, therefore, to a consideration of the questions of law involved.

There are innumerable decisions of Federal courts of appeal stating broadly that Federal appellate courts have no power to consider claimed excessiveness of verdicts, that

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1. Judge Pope, in his first opinion said: "Neither the industry of counsel nor our own research has been able to turn up any case of any Appellate Court where a verdict anywhere near so high as that rendered here has been upheld as compensation for comparable injuries." (R 375; App. A, p. 20)

this is a matter committed to the trial court on a motion for new trial and that its action is not reviewable. We have cited some such cases. Others can be found. With deference, they are wrong. They are out of harmony with the decisions of this court. The explanation of them is in part historical and in part a misunderstanding of decisions of this court.

The historical explanation lies in the earlier structure and practice of the English courts. The motion for new trial was not addressed to the trial judge sitting alone (the American practice), but "was addressed to the discretion of the court in banc." In such circumstances, for a very sound practical reason, the writ of error and motion for new trial "were mutually exclusive remedies." The reason does not exist in American practice and the result, as we shall show, is not in harmony with Federal practice.[2]

Next, it was said that there were procedural barriers to review of the trial court's action on motion for new trial. On this basis earlier cases were explained. (See Judge Learned Hand in *Miller v. Maryland Casualty Co.*, 40 F.2d 463, 464 (Circ. 2).[3]) But, as Judge Pope demonstrated below, if there ever were procedural barriers they have been removed.[4] (See particularly *Fairmount Glass Works v. Cub*

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2. The historical considerations were pointed out in ***Fairmount Glass Works v. Cub Fork Coal Co.***, 287 U.S. 474, 482, 77 L.Ed. 439, 444, note 9; *Dimick v. Scheidt*, 293 U.S. 474, 492, 79 L.ed. 603, 614, note 2; *Miller v. Maryland Casualty Co.*, 40 F.2d 463 (C.C.A. 2).

3. The American practice showed exceptions, described by Judge Learned Hand as procedural anomalies. He thought, because of procedural difficulties, that the exceptions should not be extended. But the very existence of **any** exception showed that there was not a **procedural** barrier.

4. The power of the Appellate Court to act when the result was reached under the influence of passion or prejudice is not questioned. *(Minn., etc., Co. v. Moquin*, 283 U.S. 520, 75 L.ed. 1243.) The **procedural** problem is the same.

Fork Coal Co., 287 U.S. 474, 77 L.ed. 439). We shall return to this.

Lastly, there has been, we believe, a misunderstanding of decisions of this court. The leading decisions are *New York, etc., R. Co. v. Winter*, 143 U.S. 60, 36 L.ed. 71 and *Southern Railway v. Bennett*, 233 U.S. 80, 58 L.ed 860. They held no more than that on appeal the court would not review the action of a trial court in passing on a motion for new trial for error of fact. It is true that the *Winter Case* said that correction on account of excessiveness of the verdict lay with the trial court and that its action was not assignable as error but there is nothing to indicate that anything was claimed beyond excessiveness in fact; nothing to show that there was any claim that the verdict was so grossly excessive as to be excessive as matter of law or, stated differently, so excessive as to be without support in the evidence as matter of law.[5] The distinction is made crystal clear by Mr. Justice Holmes in the *Bennett Case*. It is hard to see why there should be confusion about the holding of that case. He there said:

> "It may be admitted that if it were true that the excess appeared as matter of law,—that if, for instance, the statute fixed a maximum and the verdict exceeded it,—a question might arise for this court. But a case of mere excess upon the evidence is a matter to be dealt with by the trial court. It does not present a question for re-examination here upon a writ of error."

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5. In *Foust v. Munson S. S. Lines*, 299 U.S. 77, 84, 81 L.ed. 49, 54 the Circuit Court of Appeals had given as a reason for a stay that in negligence cases "juries often give verdicts larger than reason justifies." This court, citing its own cases holding verdicts were not sustained as matter of law, said: "It is to be remembered that if without support in the evidence or contrary to law they [excessive verdicts] may be set aside."

The cases show to a demonstration that it is only claimed errors of fact that are not subject to review; that neither the trial court's action on motion for new trial nor the amount of an award are immune from review where affected by error of law. Mr. Justice Holmes said this in the *Bennett Case* and gave as an example an award which exceeded a statutory maximum. The result is the same where damages are susceptible of mathematical computation and exceed what any computation would permit.[6] Such a case is *Hansen v. Boyd.* 161 U.S. 397, 411, 40 L.ed. 746, 751, where this court said:

> "The rule has been adopted by this court that it is proper, either for the trial court upon an application for a new trial, or for an appellate court in reviewing a judgment, to permit the party in whose favor a verdict or judgment has been returned or entered to avoid the granting of a new trial on account of error affecting only a part thereof, by entering a remittitur as to such erroneous part, when the court can clearly distinguish and separate the same."[7]

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6. For other examples see *Fairmont Glass Works v. Cub Fork Coal Co.*, 287 U.S. 473, 483, 77 L.ed. 439, 445; *U. S. Potash Co. v. McNutt*, 70 F.2d 126, 132 (Circ. 10).

7. The procedural problem here again is the same as in the case at bar. It presents no barrier. See, also, cases of conditional reversal: *Cobb v. Lepisto*, 6 F.2d 128 (Circ. 9); *American Oil Co. v. Colonial Oil Co.*, 130 F.2d 72 (Circ. 4, cert. den. 317 U.S. 679, 87 L.ed. 545); *Columbian, etc., Co. v. Keys*, 138 F.2d 382, 385 (Circ. 8, cert. den., 321 U.S. 765, 88 L.ed. 1061); *Becker Bros. v. United States*, 7 F.2d 3 (Circ. 2); *United States v. Brookridge Farm, Inc.*, 111 F.2d 461 (Circ. 10); *United States v. Certain Parcels of Land*, 149 F.2d 81, 83 (Circ. 5); *Texas Co. v. Christian*, 177 F.2d 759 (Circ. 5). Compare, as indicating that there is no procedural difficulty to reviewing action of the trial court taken after the entry of judgment, those cases holding that where a motion for directed verdict was improperly denied the court on appeal cannot reverse with directions to enter the proper judgment unless, following the verdict, there was a motion for judgment *(Cone v. West Va. P. & P. Co.,*

In a number of recent cases this court has reviewed the ruling of the trial court on motion for new trial. These cases include, among other grounds of action of the trial court, the amount of the award.

In *Fairmount Glass Works v. Cub Fork Coal Co.*, 287 U.S. 474, 77 L.ed. 439, the court had the question whether it could review action of the trial court in denying a motion for new trial on the ground of inadequacy of damages (nominal). It declined to exercise the power but the opinion leaves no doubt that it existed. The court said:

> "The rule that this court will not review the action of a federal trial court in granting or denying a motion for a new trial **for error of fact** has been settled by a long and unbroken line of decisions * * * The rule precludes likewise a review of **such** action by a circuit court of appeals."[8]

It then noticed the suggestion of the *Miller Case* that there was a procedural impediment to the exercise of the power but concluded that such impediment did **not** exist and held

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330 U.S. 212, 91 L.ed. 849; *Globe Liquor Co. v. San Roman*, 332 U.S. 571, 92 L.ed. 177). The necessary implication is that the record must show the proceedings on such motion, with the further necessary implication that the modern method of getting up a record on appeal from a judgment does not preclude incorporating matters which occurred after judgment where a review of them is appropriate on appeal from the judgment. That the trial court's action on motion for new trial can be reviewed on appeal from the judgment is clear from the case noticed in the text. And see note 11 below. Compare the implications arising from Fed. Rules Civ. Proc., Rule 59(d) requiring the court to specify the grounds of action when it grants a new trial on its own motion. This is noticed in Judge Pope's opinion (R 392, note 7; App. A, p. 33, note 7).

8. At 287 U.S. 485, 77 L.ed. 446, the court, speaking of the action it was taking, noticed that it "frequently *refrained* from disturbing the trial court's approval of an award of damages" and said that circuit courts of appeal generally followed "a similar *polity*," guarded forms of expression clearly indicating a desire to avoid any intimation that there was no such power.

that "it becomes necessary, therefore, to determine whether the circumstances of the case at bar justify an inquiry into the trial court's refusal to set aside the verdict." In so holding the court said (we omit supporting citations):

> "Under certain circumstances the appellate court may inquire into the action of a trial court on a motion for a new trial. Thus, its denial may be reviewed if the trial court erroneously excluded[9] from consideration matters which were appropriate to a decision of the motion; or if it acted on the mistaken view that there was no jurisdiction to grant it, or that there was no authority to grant it on the ground advanced."

This case was followed by *Dimick v. Scheidt*, 293 U.S. 474, 79 L.ed. 603, particularly instructive for its extensive review of the English and early American practice in passing upon motions for new trial where it was claimed damages were inadequate or excessive—as to the English practice, particularly interesting in view of the fact that as the court points out (footnote 2) the motion for new trial was addressed "not to the trial judge but to the court sitting en banc." The court reviewed the action of the trial court in passing on a motion for new trial for inadequacy of damages and denying it, and affirmed the judgment of the Circuit Court of Appeals for the First Circuit reversing the trial court. The plaintiff Scheidt made a motion for new trial on the ground of inadequacy of damages. The court denied the motion on defendant's consent to an increase in the award. Plaintiff appealed, the Circuit Court of Appeals for the First Circuit reviewed and reversed and this court affirmed the Circuit Court of Appeals. The significance of

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9. Erroneous inclusion for consideration of matters not appropriate would seem equally a ground for review.

the holding is highlighted by the dissent. It went upon the ground that on appeal inquiry could not be made into the reason for the trial court's action. The majority held that such inquiry could be made and when it was found that the action was based on an error of law the judgment was reversed. It is interesting to notice that even the four Justices who dissented stated that if this represented a change in the old rule it was one which was not unwelcome.[10]

In *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 247, 84 L.ed. 1129, 1181, the court said that the case fell within the rule that a reviewing court will not pass on the action of a trial court "in granting or denying a motion for new trial **for error of fact**, since such action is a matter within the discretion of the trial court," citing the *Fairmount Case* and noticing that there would be such review for error of law, i.e., erroneously excluding from consideration matters which were appropriate. In *Montgomery Ward & Co. v. Duncan*, 311 U.S. 243, 85 L.ed. 147, the cause was remanded for action by the trial court on a motion for new trial (one of the grounds of which was that the verdict was excessive) where the position had been taken that the granting of a motion notwithstanding the verdict operated as a denial of a motion for new trial. In the *United States v. Johnson*, 327 U.S. 106, 111, 90 L.ed. 562, 565, the action of the trial court in denying a new trial on the ground of newly discovered evidence was reversed by the Circuit

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10. Opinion of Mr. Justice Stone, concurred in by Mr. Chief Justice Hughes, Mr. Justice Brandeis and Mr. Justice Cardozo, speaking of the majority opinion: "If the effect of what is now decided is to liberalize the traditional common law practice so that the denial of a motion for a new trial made on the ground that the verdict is excessive or inadequate, is subject to some sort of appellate review, the charge need not be regarded as unwelcome, even though no statute has authorized it."

So far as we are aware no court which has denied the existence of the power has done so upon the ground that it is undesirable to have power to review verdicts claimed to be grossly excessive. To the contrary, even though the existence of the power has been denied, it has been with indications that the power should exist.[14] (And see note 5 above.)

An appellant need not go so far as to show that the jury was influenced by passion or prejudice. At the other extreme, an appellate court is not a fact-finding body and will not grant relief because of error of fact. The field between is generally described as that of discretionary action.[15] The cases establish some guides for measuring the exercise of discretion.

This court's statement of the rule is that appellate courts will not review the action of the trial court "for error of fact." It has not left it in the air what error of fact means. And it has tied this in with the general expression that the trial court will be reversed for abuse of discretion. In the *Socony-Vacuum Case*, above, it was said that the trial court would not be reversed "for error of fact, since such action

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Dressler, 112 F.2d 972, 976. Eighth: *United Trust Co. v. Woodrow Mfg. Co.*, 63 F.2d 602, 609. Ninth: *Cobb v. Lepisto*, 6 F.2d 128; *Dept. of Water, etc. v. Anderson*, 95 F.2d 577, 586; *Estabrook v. Butte, etc., Ry. Co.*, 163 F.2d 781. Tenth: *U. S. v. Brookridge Farm, Inc.*, 111 F.2d 461; *Marshall's, etc., Supply v. Cashman*, 111 F.2d 140; *Chambers v. Skelly Oil Co.*, 87 F.2d 853.

14. See the language of the dissenting judges in *Dimick v. Schiedt*, note 10 above, Judge Learned Hand's comments in *Miller v. Maryland Casualty Co.*, 40 F.2d 463 (Circ. 2) and the language from the *Ferguson Case*, 182 F.2d 949 (Circ. 8) quoted by Judge Pope in his second opinion (R 393; App. A, p. 34).

15. The court below recognized the clear distinction between the power and function of the trial court on motion for new trial and the Appellate Court.

is a matter within the discretion of the trial court." The discretion referred to was the very wide power the trial court has on motion for new trial to review the case *de novo*, determine for itself where the weight of evidence and the right lies, and determine **as matter of fact** whether the verdict should stand. (*Maryland Ins. Co. v. Ruden's Adm'r*, 6 Cranch 338, 340, 3 L.ed. 242, 243; *Chesapeake & O. Canal Co. v. Knapp*, 9 Pet. 541, 579, 9 L.ed. 222, 233; *Kelly v. Jackson*, 6 Pet. 622, 632, 8 L.ed. 523, 527; *Capital Traction Co. v. Hof*, 174 U.S. 1, 43 L.ed. 873; *Montgomery Ward & Co. v. Duncan*, supra; *Arkansas, etc., Co. v. Mann*, 130 U.S. 69, 34, 32 L.ed. 854, 856; *Aetna, etc., Co. v. Yeatts*, 122 F.2d 350 (Circ. 4); *Felton v. Spiro*, 78 Fed. 576, 583 (Circ. 6); *General Am. L. Ins. Co. v. Central Nat. Bk.*, 136 F.2d 281 (Circ. 6).

The implication is clear that the statement that the action will be reversed only for abuse of discretion is restricted to those cases in which the court, passing on a motion for new trial, is properly acting in the field of questions of fact committed to its discretion. The limitation on the power of the appellate court does not apply when the error of the trial court is one of law. This seems clear enough from the language of the *Fairmount Case*. It is equally clear when legal meaning is assigned to the expression "abuse of discretion." There can be no proper exercise of discretion when there is error of law.

Langnes v. Green, 282 U.S. 531, 541, 75 L.ed. 520, 526;[16]

16. "When invoked as a guide to judicial action it means a sound discretion, that is to say, a discretion exercised not arbitrarily or wilfully but with regard to what is right and equitable under the circumstances and the law and directed by the reason and conscience of the judge to a just result."

Beck v. Wings Field, Inc., 122 F.2d 114, 116 (Circ. 3);[17]

Cohen v. Young, 127 F.2d 721, 726 (Circ. 6);[18]

Grant v. Husckhke, 70 Wash. 174, 126 P. 416, 417;[19]

Devine v. Wells, 300 Mo. 177, 254 S.W. 65, 68.[20]

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17. "A wide range of discretion rest with the trial court in the granting or refusing of a new trial. See Federal Rules of Civil Procedure, Rule 61, 28 U.S.C.A. following section 723c. In fact, it is only for an abuse of discretion in refusing a new trial that an appellate court will reverse. The term 'abuse,' however, when applied to a court's exercise of its discretion is peculiarly of legal significance, wholly unrelated to the meaning of the same term when used in common parlance. Action that would be necessary in ordinary affairs to make one guilty of an abuse connotes conduct of a different grade than what is meant when a court is said to have abused its discretion. **Abuse of discretion in law means that the court's action was in error as a matter of law.** And where such abuse exists, reversal will be ordered. See *Cervin v. W. T. Grant Co.* (5 Circ.), 100 F.2d 153, 155, 156."

18. "The exercise of discretion **does not permit the court to disregard the substantive principles of law** established for the protection of litigants. One of these principles is that judgments and decrees which make findings of fact shall be founded on evidence. Thus it is **an abuse of discretion to refuse to receive and consider evidence** by which the court's discretion should be guided or controlled. *Goodyear Tire & Rubber Co. v. National Labor Relations Board* (6 Circ.), 122 F.2d 450, 453, 136 A.L.R. 883; *Commonwealth v. White*, 147 Mass. 76, 78, 16 N.E. 707."

19. "The respondent argues that the granting of a new trial is a matter of sound discretion, and that where that discretion has not been abused the judgment will not be disturbed. The rule stated is correct when the discretion of the court is exercised upon the facts, **but it is not correct where it is exercised upon questions of law. In such cases the ruling of the court will be treated the same as a ruling upon any other legal question** arising in the progress of the trial, and this court will determine its correctness independently of the judgment of the trial court."

20. "The discretion of the trial court is not, however, an unlimited one. It is not measured by the mere will of the trial judge. It is 'not a capricious or arbitrary discretion, but an impartial discretion, guided and controlled in its exercise by fixed legal principles.' *Bailey v. Taaffe*, 29 Cal. 423, cited in *Parks v. Coyne*, supra, and in many other cases. **It does not extend to an unmixed question of law. A trial court may not arbitrarily deny a conclusively established fact.** The rule looks to substantial justice in the

Compare:

Home Owners', etc. v. Huffman, 134 F.2d 314, 316, 317 (Circ. 8);

Dolen v. State, 148 Neb. 317, 27 N.W.2d 264, 267;[21]

State v. Shafer, 71 Oh. App. 1, 47 N.E.2d 669, 670;[22]

State v. Glenn, 195 S.C. 410, 11 S.E.2d 859;[23]

Harrington v. Worcester, etc., Co., 157 Mass. 579, 32 N.E. 955;

Dziegel v. Westford, 274 Mass. 291, 174 N.E. 495;

Ambler Nat. Bk. v. Maryland, etc., Co., 147 Pa. Super. 496, 24 A.2d 123, 126;

Peterson v. John Hancock, etc., Co., 116 F.2d 184, 151 (Circ. 8).[24]

Within the cases just noticed it is error, and abuse of discretion, which may be corrected, for the court to include something not appropriate for consideration or to exclude something which should be considered. (The *Fairmount*

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end, and the ruling obviously ought to be reviewed and corrected when its clear result is to the contrary."

21. "Rather it is our view that, when judicial discretion is exercised contrary to law and to the commonly recognized legal principles, it indicates an abuse of discretion."

22. Speaking of abuse of discretion the court stated: "In our judgment it does not necessarily mean, and in the instant case certainly does not mean, ulterior motive, arbitrary conduct, or a willful disregard of the rights of a litigant. It does mean, in our judgment, the failure to apply the principle of law applicable to a situation if thereby prejudice results to one of the litigants."

23. " 'Abuse of discretion' is a 'legal term to indicate that the appellate court is simply to the opinion that there was commission of an error of law in the circumstances'."

24. This was a bankruptcy case and the question was whether there was an abuse of discretion in denying a rehearing. Between the time of decision and the time of passing on the motion for rehearing there had been a change in decision but the trial court refused to apply the new rule.

Case, p. 28, above; the *Socony-Vacuum Case,* p. 29, above; *Reisberg v. Walters,* 111 F.2d 595, 597 (Circ. 6); *Virginian Ry. Co. v. Armentrout,* 166 F.2d 400 (Circ. 4).)

Turning to what was done in the case at bar, it must be noticed preliminarily that where, as under the Federal Employers' Act, the comparative negligence rule is applied, and contributory negligence is not a defense in bar, a verdict for the plaintiff, by that token alone, does **not** eliminate contributory negligence, and, in passing on the propriety of the amount of the award, contributory negligence and its effect is a matter appropriate for consideration.

Hadley v. Union P. R. Co., 99 Neb. 349, 156 N.W. 765 following,

Penn. Co. v. Sheeley, 221 Fed. 901, 906 (C.C.A. 6) and affirmed in

Union P. R. Co. v. Hadley, 246 U.S. 330, 62 L.ed. 751;[25]

Ala., etc., Ry. Co. v. Norrell, 225 Ala. 503, 143 So. 904, 907;

L. & N. R. Co. v. Grizzard, 238 Ala. 49, 189 So. 203, 213 (on rehearing), cert. den, 308 U.S. 603, 84 L.ed. 504;

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25. The *Hadley Case* was an action for death under the Federal Employers' Liability Act. The jury returned a verdict for $25,000 and made a special finding that there should be no deduction for contributory negligence. The trial court cut the award to $15,000, without specifying the ground. The Supreme Court of Nebraska held that the verdict should be reduced to $18,000 without regard for the effect of contributory negligence. It then considered contributory negligence and determined that because of contributory negligence there should be a further reduction to $13,500. The case went to the Supreme Court of the United States and in affirming the judgment that court said: "The court had the right to require a remittitur if it thought, as naturally it did, that the verdict was too high."

St. Louis-San Francisco Ry. Co. v. Fine, 184 Ark. 940, 44 S.W.2d 340, 343, cert. den. 286 U.S. 552, 76 L.ed. 1287;

Waina v. Penn. Co., 251 P. 213, 96 Atl. 461;

Tate v. Chicago, etc., R. Co., 172 Wash. 33, 19 P.2d 137, 138, cert. den. 290 U. S. 631, 78 L.ed. 549;

Louisville & N. R. Co. v. Parker, 223 Ala. 626, 138 So. 231, cert. den. 287 U.S. 569, 77 L.ed. 501;

Anest v. Columbia P. & R. Co., 89 Wash. 609, 154 Pac. 1100.

There is a second preliminary proposition: It is the settled rule that damages can be awarded for future detriment only where the elements of future detriment are proved, by the plaintiff, with "reasonable certainty." (*Chicago, etc., Ry. Co. v. Lindeman,*[26] 143 Fed. 946, 950 (Circ. 6); *Chicago, etc., Ry. Co. v. DeClow,*[27] 124 Fed. 142, 143 (Circ. 8); *Bellman v. San Francisco, etc., Dist. Co.,* 11 C.2d 576, 588, 81 P.2d 894. Cf. *Union Oil Co. v. Hunt,* 111 F.2d 269, 277, col. 2 (Circ. 9).)

The trial court (R 71; App. A, p. 42), in denying the motion for new trial said that "present value of loss of future earnings is substantial,—between $60,000 and $70,000." There is no evidence which will support a figure of $70,000 with the "reasonable certainty" required by the cases. No computation can be made which will reach any such

26. "The liability for future damages for the wrongful infliction of a personal injury is strictly limited to compensation for such suffering and other effects of the act as are reasonably certain to result from it. Possible, even probable, future damages are too remote and speculative to form the basis of legal injury."

27. The court uses the same language as that used in the *Lindeman Case* and quoted in note 26.

figure unless error is incorporated into the calculation in one or more of the following respects:

1. The calculation is made on the basis of past gross earnings instead of take-home-pay and deduction of income tax;

2. Maximum earnings for the full period of the work expectancy are assumed;

3. Total disability is assumed;

4. The computation of present value is made by the use of a rate of interest which is too low;

5. There was a complete failure to give any effect to the palpable contributory negligence of respondent.

In the Court of Appeals the same errors are apparent except that some consideration was given to income tax[28] and a higher rate of interest, 3%, was used (see *Virginian Ry. Co. v. Armentrout*, supra).

For present purposes contributory negligence has been sufficiently dealt with in stating the facts in the petition (see pp. 8 ff., above).

A rate of interest higher than 3% might well have been selected where no evidence was introduced as to the proper rate. This hardly seems "the highest net rate of interest" that can be had on money safely invested, called for by *Gulf, etc., Ry. Co. v. Moser*, 275 U.S. 133, 135, 72 L.ed. 200,

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28. Uncertainty as to the handling of income tax is introduced by *Stokes v. United States*, 144 F.2d 82 (Circ. 2) and *Chicago, etc., Ry. Co. v. Curl*, 178 F.2d 497, 502 (Circ. 8).

We know of no cases in appellate courts beyond the above two, the *Armentrout Case* and the case at bar which have considered this matter except *Billingham v. Hughes* (1949), 1 K.B. 643, 9 A.L.R. 2d 311, which held that income tax should not be deducted. The case is not helpful. Under the English statute the award is subject to income tax. Our statutory rule is the other way. (26 U.S.C.A. § 22(b)(5)) Indeed Lord Justice Singleton clearly indicates in his opinion that the result would be the other way were the English statute like our statute.

201. (Cf. *Aetna Life Ins. Co. v. Geher*, 50 F.2d 653 (Circ. 9, —7%); *Sabine Towing Co. v. Brennan*, 85 F.2d 478, 481 (Circ. 5, —6%); *The Black Gull*, 4 F.2d 619 (Circ. 2, —4%); *Simonds v. La. R., etc., Co.*, 153 La. 405, 96 So. 12 (5%); *Gill v. B. & O. R. Co.*, 302 Mo. 317, 259 S.W. 93, cert. den. 265 U.S. 592, 68 L.ed. 1196 (4% and 5%).)

It was an error of law to assume sustained maximum earnings for the full period of the work expectancy to the age of compulsory retirement. (*Littman v. Bell Tel. Co.*, 215 Pa. 370, 172 Atl. 687; *Preferred Acc. Ins. Co. v. Combs*, 76 F.2d 775, 781 (Circ. 8); *In re Paczoch's Estate*, 202 Iowa 849, 211 N.W. 500.)

There was no warrant for assuming total disability. Even when schedules are set up none, so far as we are aware, has treated loss of a leg above the knee as producing total disability but universally treat loss of a leg as producing something less than total disability[29] (see App. C).

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29. For example, rates for compensation for service-connected disabilities under the Act of July 14, 1862, as amended and re-enacted, and as fixed under "general law" are $125 for loss of sight of both eyes, also both arms or both legs or a total disability of both arms or both legs and only $90 for loss of a leg at or above the knee (38 Code of Fed. Regulations (1949 ed.) § 3.1062, p. 103).

The "American Standard Method of Computing Industrial Injury Rates" approved October 11, 1945 by the American Standards Association sponsored by National Safety Council, National Council on Compensation Insurance and International Association of Industrial Accident Board and Commissions, lists as total disability only loss of (a) both eyes; or (b) one eye and one hand, or arm, or leg, or foot; (c) any two of the following not on the same limb: hand, arm, foot, or leg.

The California Workmen's Compensation Act (Labor Code § 4662) lists as disabilities conclusively presumed to be total only (a) loss of sight of both eyes, (b) loss of both hands or the use thereof, (c) practically total paralysis and (d) brain injury resulting in incurable imbecility or insanity.

Compare the Nevada Workmen's Compensation Act §§ 25b and 25c, Nev. Comp. Laws, 1929, § 2706.

For a review of the compensation statutes of the states and the United States, taken from a bulletin of the Department of Labor see App. C.

CONCLUSION

We respectfully submit that the questions presented and the way they were treated call for the exercise of this Court's "power of supervision over the administration of justice in the Federal courts" (*Thiel v. Southern Pacific Company*, 328 U.S. 217, 225, 90 L.ed. 1181, 1187), and that the result in this case calls for review to the end "of correcting an absolutely plain injustice, in the interest of judicial administration itself" (*Louisville & N. R. Co. v. Botts*, 173 F.2d 164, 170 (Circ. 8).

Dated at San Francisco, California, February 21, 1951.

ARTHUR B. DUNNE,
Attorney for Petitioner
Southern Pacific Company,
a corporation.

(Appendices follow)

APPENDIX A

In the United States Court of Appeals for the Ninth Circuit

SOUTHERN PACIFIC COMPANY, a corporation, *Appellant,* vs. GARRY T. GUTHRIE, *Appellee.*	No. 12,164 Dec. 30, 1949

OPINION

Appeal from the United States District Court for the Northern District of California, Southern Division

Before: BONE and POPE, Circuit Judges, and BLACK, District Judge.

POPE, Circuit Judge.

Southern Pacific Company has appealed from a judgment recovered against it by Garry T. Guthrie in an action brought under the Federal Employers Liability Act, 45 U.S.C.A. Sec. 51 et seq. The contentions most strenuously urged by appellant are (1) that there was no evidence of negligence on its part, and (2) that the damages recovered are excessive. The company also specifies as error the re-

fusal of the court to give numerous requested instructions, and the admission of evidence to which we shall call attention hereafter.

Guthrie was a locomotive engineer employed by the Southern Pacific Company. He had completed a run from Yuma to Gila Bend, Arizona, on the morning of October 27, 1947. Later the same day he received orders to "deadhead" to Yuma, to the west. This meant he could travel by freight, or passenger train, or both. Pursuant to these orders he took a freight train to Sentinel, Arizona, which was part way, and at that point decided to change to a passenger train, which was due to arrive shortly, in order to shorten the time required for his trip. Accordingly he waited at Sentinel for the arrival of passenger train No. 5, westbound for Los Angeles. The train reached the Sentinel yards about 9:30 P. M. and was obliged to pass through the yards on the north side passing track or siding on account of a broken rail on the main line track. This necessitated the train coming back on the main line at a switch on the west end of the siding.

The switch stand, by which this switch was operated, was north of the main line. On the other side was the station platform, where Guthrie had been waiting. When the train moved slowly through the passing track, he set his grip down on the platform and crossed over the track to the switch stand in order to throw or line the switch so that the train could come out on the main line. It was customary for engineers and other trainmen, when traveling as he was, to furnish such assistance to the train crew, and there is no question but that Guthrie was then in the course of his employment and then engaged in interstate commerce.

As he moved over to the switch stand Guthrie was standing in the full beam of the locomotive's headlight. The train was moving very slowly. The fireman had climbed down on the right hand, or engineer's side of the engine, intending to throw the switch himself, and had gone ahead for that purpose, but when he saw Guthrie, dressed as an engineer, unlock and line the switch, and give the customary signal to proceed, he waited for the engine to come along and then climbed back on the engine.

After Guthrie had thus signaled to come ahead, he started to cross the track to the south, back toward where he had left his grip. When he took the first step, with his right foot, between the rails, his foot or shoe caught in the space between the tie bar and head block or switch tie, and he could not pull it out. He shouted, but could not be heard above the engine noise and he could not be seen from either window of the locomotive cab because of the width of the engine. As the locomotive continued toward him he threw himself backward over the rail, so that he saved his left leg and body, but his right leg was run over and cut off at a point between the knee and the hip.

The appellant urges that there is no evidence of negligence on the part of the company. Under the court's charge there were submitted to the jury two claims of negligence, one that there was negligence "in connection with the maintenance of the area in and about and connected with the switch," and one that there was negligence "on the part of the fellow employees in the operation of the railroad engine." Appellant says that there was negligence in neither respect, and further, that if either of these claims must fall for want of evidence, the judgment must be reversed for the reasons stated in Wilmington Mining Co. v. Fulton,

205 U.S. 60, because, under the general verdict, it cannot be known upon what ground the jury went.

Guthrie gave several reasons why he crossed the track after lining the switch. He had left his grip on the side opposite the switch stand and he had to go to that side to board the train which opened up for passengers on that side. Two company rules were mentioned. One provided: "While the train is moving over a switch any employee in the vicinity of such switch must take position on the opposite side of the track from switch when practicable, and when not practicable to do so must take position 20 feet from switch stand." The other rule was cited by Guthrie as his reason for crossing at that particular place. He said he did so in order to inspect the points of the switch. The switch points are the moveable portions of the rails, tapered at the ends, which are moved back and forth as the switch is operated. This rule provided that: "When a switch is thrown, the employee setting it must see that both points have moved to the proper position."

When Guthrie stepped between the rails his right foot was caught between the tie which is referred to as the switch tie, or head block, and the No. 1 tie rod. The switch tie is the tie which is extended beyond the other ties to furnish support for the switch stand. The tie rod connects the two switch points, so that when the switch is thrown, both rails move together. Fastened to the inside of the switch points on either side are metal transit clips, in which five bolt-holes are set on an angle, and as the connecting tie rod is fastened by bolts in these holes, the correct distance between the two switch points can be maintained by moving the bolts from hole to hole. At the time of the accident the

tie rod was bolted to the middle hole of the north clip and the second hole from the east on the south clip. Partly in consequence of this, the space between the switch tie and the tie rod tapered from a two-inch space on the north to a four-inch space on the south. Guthrie stepped into this space between switch tie and tie rod. He said that as he did so his foot went into a hole. The track was ballasted with slag, but Guthrie testified that at the point where he stepped, the ballast, instead of being in place up to within four inches of the top of the ties, was down to a depth of 7, 8 or 9 inches, sloping down toward the north, so that as he stepped his foot slipped back under the narrower portion of the space between switch tie and tie rod, and his foot became wedged in this space. He was thrown, and fell on his left side. He got up, but could not pull his foot out. He thought his leg was broken. Another witness who later picked up the severed leg thought it was broken at the ankle.

Other witnesses who examined the location a few days after the accident and while conditions at the switch remained the same, testified as to the depth of the ballast beneath the tie rod where Guthrie caught his foot. One of them said that he measured a distance of nine inches from the bottom of the tie rod to the top of the ballast at the north side of the track and that the measurement was seven inches below the tie rod at the other side of the track. Another witness testified that about the same time he examined the location and found that the top of the ballast between the two ties and inside of the two rails was nine inches below the top of the ties. According to his testimony the ballast at this point was actually slightly lower than the bottom of the ties. He described it as "saucer shaped" and said

that the appearance was as if some of the ballast had been taken out.

Not only did the company produce evidence of measurements made tending to controvert Guthrie's claim that he stepped into a hole, but it attacks the claim of the existence of a hole at this point as not entitled to any credit whatever for two reasons. It says that if the ballast were actually below the bottom of the two ties, the movement and weight of the trains operating there would have moved the two ties together for want of ballast between them. It is asserted that the photographs of the locality taken shortly after the incident showed that the ballast was in a normal position and that there was no hole in which Guthrie could have stepped. With respect to the claim that the ties would have shifted, plaintiff's counsel argue that there is no claim that there was no ballast between the ties and that there is nothing to show that the ballast between the ends of the ties outside of the rails would not have been sufficient to hold the ties in place. An examination of the original photographs which are part of the record in this court does not furnish any satisfactory answer to the controversy. Obviously, the taking of a photograph of space between ties in such manner as to show depth, is an exceedingly difficult undertaking in the absence of some stereoscopic device. Exhibits 7, L and J, which are photographs, seem to indicate some extra depth in ballast at this point, while in exhibits I, K, H, and F, also photographs, taken at the same time, the depth seems less.

The evidence does show that in ordinary railroading

practice it is standard procedure to have the ballast beneath this moving portion of a switch slightly lower than the ballast elsewhere along the track. Some allowance must be made for the movement of the tie rods. It was testified on behalf of the defendant that the top of the ballast was 4½ inches lower than the top of the ties.

Viewing the evidence in the light most favorable to Guthrie, we believe that the jury would be warranted in believing that there was sufficient credible evidence to support a claim that when Guthrie stepped between the rails his foot was placed at a point where it was able to slide backward toward the north side of the track into a hole. An inspection of some of the photographs would tend to indicate the existence of a hole of some depth at this point. It is reasonable to believe that if a hole was near the north rail his movement toward the south would make the thrust of his foot toward the north, where he said the hole sloped off, and wedge his ankle into the narrow portion of the space between the switch tie and the tie rod. If he then, in this predicament, fell toward the left, his foot being held against the tie, the tie rod might well supply enough leverage to break his leg.

With respect to the claim of negligence in the operation of the engine, the evidence showed that the locomotive was moving very slowly when Guthrie moved over to throw the switch. Guthrie's testimony was that it was moving so slowly that he could not be sure that it was moving at all. The fireman estimated the speed to be three or four miles an hour, slow enough so that when he got down on the ground he could "get ahead of the engine by either walking or trotting slowly." The fireman had made a few steps toward the switch after getting down on the engineer's side

when he saw Guthrie at the switch and that he had correctly lined the switch for the locomotive to proceed. The fireman saw Guthrie give the "come ahead" signal, saw Guthrie start crossing the track toward the south side, waited for the ladder of the engine to come to where he was standing, and after climbing up to the locomotive cab, walked across to his own side and looked for Guthrie. He saw Guthrie's grip on the ground but saw nothing of Guthrie. The fireman then went back to the other side of the engine, saw nobody there and started down the ladder. It was after that that the fireman heard Guthrie's cries and told the engineer to stop.

It clearly appears that the portion of the locomotive ahead of the cab was so wide that there was no opportunity for the engineer from his position to see Guthrie after he started to cross the track. Counsel for Guthrie placed the negligence upon the fireman in two particulars; in the first place, it is asserted that the fireman was negligent in not remaining upon the ground where he was when he saw Guthrie start to cross the tracks until such time as he had made sure that Guthrie was safely across. In the second place, it is asserted that when the fireman returned to his own station on the left side of the cab and looked for Guthrie and did not see him, he should have known that something was wrong and told the engineer to stop.

Without considering the first of these contentions, it seems that the record contains evidence which might warrant the jury in believing that when the fireman looked out and saw that Guthrie was missing there was yet time to have stopped the locomotive before it reached him. Guthrie testified that when he threw the switch the locomotive was between 200 and 250 feet away. If the locomotive was mov-

ing at three miles per hour this means it was traveling approximately 4½ feet per second. It would probably be a matter of common knowledge that since the fireman was only a few steps from the ladder when he stopped, it would not take him more than 20 seconds to climbs the ladder and return to his station. Accordingly, in that time the locomotive would have traveled 90 feet, and it would still be a considerable distance away from where Guthrie was caught. It is true that the fireman placed the front of the locomotive much closer to Guthrie than would appear from Guthrie's testimony, but the resolving of that difference would be for the jury.

A mere reference to the more recent decisions of the Supreme Court is all that is required to demonstrate that there was sufficient evidence to warrant the court in submitting both claims of negligence to the jury. Tiller v. Atlantic Coast Line R. Co., 318 U.S. 54; Bailey v. Central Vermont Ry. Co., 319 U.S. 350; Tennant v. Peoria & P. U. Ry. Co., 321 U.S. 29; Lavender v. Kurn, 327 U.S. 645; Ellis v. Union Pacific R., 329 U.S. 649; Wilkerson v. McCarthy, 336 U.S. 53.

The evidence indicates that it was entirely proper for Guthrie to cross the track as he did. Under these circumstances, the duty to provide a safe place to work was such that under the decisions mentioned it was for the jury to say whether negligence existed in connection with the maintenance of the area in and about and connected with the switch. Cf. Southern Ry. Co. v. Puckett, 16 Ga. App. 551, 85 S.E. 809, affirmed 244 U.S. 571 and cited in Brown v. Western R. Co., 338 U.S. 294, decided November 21, 1949.[1]

[1]The company's roadmaster testified as follows: "Q. Let me ask you this: If the tie bar and the head block were so close together

It is even more clear, we think, that it was a jury question whether the fireman's delay in warning the engineer to stop constituted negligence.[2]

Appellant made a motion for a new trial upon the ground, among others, that the verdict is excessive and appears to have been given under the influence of passion and prejudice. It is said the verdict for $100,000 is contrary to the evidence in that it appears from its amount that no reduction in the amount of the award was made because of the contributory negligence of the plaintiff.

In this connection appellant calls attention to the comparative negligence rule which was adopted by the Employers Liability Act, and argues that the court cannot properly consider the propriety of a verdict of this size without at the same time considering the evidence to determine whether the jury made proper deductions or any deduction on account of claimant's contributory negligence. This, it is said, requires that the court review the evidence of contributory negligence.

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that they were two inches in one end, three inches in the middle and four inches at the other end, and if you had a seven-to-nine inch hole underneath that so that a man may get his leg caught and broken in there, wouldn't you say as a track man and roadmaster, wouldn't you consider that to be a dangerous condition? A. I would, sir." Appellant has an ingenious explanation for this answer, saying that the witness merely meant that it was dangerous because the ties would move. We think that since the question referred to getting the leg caught the witness must have understood the question as referring to danger for a man crossing.

[2]For a summary of the recent decisions of the Supreme Court dealing with this question see Appendix to opinion of Mr. Justice Douglas, concurring, in Wilkerson v. McCarthy, 336 U.S. 53 at 71. It is noteworthy that the Supreme Court has recently reversed a state supreme court upon this point by per curiam decision simply upon the authority of the cases here cited. Hill v. Atlantic Coast Line Railroad Co., 336 U.S. 911.

We shall have occasion later in this opinion to consider the question of the claimed excessive amount of the verdict. But insofar as contributory negligence may have a bearing on its amount, it is our opinion that for the same reason that the question of negligence *vel non* on the part of the company was one to be decided by the jury, the question of whether plaintiff was guilty of contributory negligence was also one for the jury to decide.

Appellant specifies error in respect to the court's failure to give, in the language proposed by appellant, a considerable number of requested instructions. It is not claimed that the court's charge was not technically correct, as far as it went, but it is said that the instructions should have been amplified to the end that the jury be furnished standards and tests to guide it in the determination of the issues submitted to it.[3]

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[3]Some of the requested instructions were cautionary in character and designed to warn the jury against being misled in certain directions. Included in this group are instructions that the damages must not be more than reasonable; that the amount demanded in the complaint is no proof but is merely a claim; that the jury are not to fix damages by inquiring what sum they would take to exchange places with the plaintiff; that damages must be proved with reasonable certainty, and that the jury must not speculate or conjecture; that if plaintiff's loss of earning capacity is not total, due allowance for possible earnings must be made; that an award for loss of earning capacity must be limited to the present value or worth of the anticipated losses; that damages must not constitute a gift or windfall to plaintiff or be awarded as punishment or penalty to the defendant; that the jury must not be misled by the words "in whole or in part" in the Act, but that the plaintiff must prove that defendant's negligence, if any, was a proximate cause of his injury; that mere risk or hazard or danger is not itself negligence; that the defendant is not liable in absence of proof of negligence; that the defendant was not required to use the utmost care, but only ordinary care and ordinary skill; that defendant was not bound to provide and maintain the best and safest conditions, or to supply facilities, equipment or appliances which were not called for as a practical matter and in the exercise of ordinary care; that

The court's charge to the jury, although brief, covered the issues to be determined.[4] The main contention of appellant is that the instructions were too brief. Thus, although "negligence" was properly defined, it is complained that the court should have defined "contributory negligence" in a separate instruction, and in the language which the courts commonly use for that purpose.

Here it is well to bear in mind what was said in Continental Improvement Co. v. Stead, 95 U.S. 161, 165: "Perhaps some of the abstract propositions of the defendant's counsel contained in the instructions asked for, based on the facts assumed therein, if such facts were conceded, or found in a special verdict, would be technically correct. But a judge is not bound to charge upon assumed facts in the *ipsissima verba* of counsel, not to give categorical answers to a juridical catechism based on such assumption. Such a course would often mislead the jury instead of enlightening them, and is calculated rather to involve the case in the meshes

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in determining whether plaintiff was guilty of contributory negligence, the jury must consider all the evidence, that produced by the plaintiff as well as that produced by the defendant.

[4]The charge of the court correctly defined negligence and stated the effect of contributory negligence on the part of plaintiff if the jury should determine that such existed. The jury were told that they must exclude any sympathy as a basis for any verdict; that they must not have any prejudice against the defendant because it is a corporation or engaged in railroad business, or is an employer; that any award of damages must be reasonable. They were correctly instructed as to the provisions of the Federal Employers Liability Act and of the necessity of proving that plaintiff's injuries were proximately caused or contributed to by the negligence of the employer. The jury were advised with great care as to the application of the rule of comparative negligence in the event that the jury should find contributory negligence, and the jury were told of the duty of the plaintiff to exercise reasonable care for his own safety. They were told that if the accident occurred solely and exclusively from the negligence of the plaintiff, their verdict must be for the defendant.

of technicality, than to promote the ends of law and justice. It belongs to the judicial office to exercise discretion as to the style and form in which to expound the law and comment upon the facts. If a judge states the law incorrectly, or refuses to state it at all, on a point material to the issue, the party aggrieved will be entitled to a new trial. But when he explains the whole law applicable to the case in hand, as we think was done in this case, he cannot be called upon to express it in the categorical form, based upon assumed facts, which counsel choose to present to him." Cf. Tyson-Long Co. v. Wolfe, 81 F.2d 82, 84.

While some of these requested instructions might properly have been added to the charge,[5] yet we find no prejudicial error in their omission. Others were properly refused for other reasons. Some were peremptory, and therefore, for reasons we have previously stated in commenting upon proof of negligence, they were properly rejected.

Other requested instructions not only added no essential feature to the charge given, but were subject to other valid objections.[6]

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[5]A comparison of the requested instructions with the court's charge would indicate that appellant's requested instruction No. 5, defining present worth of prospective loss of earning capacity, was more complete than the instruction of the court on the same subject, in reciting that the amount should be so computed that "at the end of the period for which allowance is made nothing would remain." Appellant has not argued that the charge was defective in this particular. Nor was this point specified in the objections to the instructions. It was then stated: "We respectfully object and except to the refusal of the court to give defendant's instruction No. 5, that the question is not loss of wages, but also loss of earning capacity, and only that could be used." See Rule 51, Rules of Civil Procedure, 28 U.S.C.A. foll. sec. 723c. Cf. Hall v. Aetna Life Ins. Co. (8 Cir.), 85 F.2d 447, 450.

[6]Thus the request No. 29, to the effect that because of the construction of the locomotive in such manner that Guthrie was out of

It is earnestly argued that the verdict is so grossly excessive as to require a conclusion that it was the result of passion and prejudice. It is contended that the trial court erred in refusing a new trial on this ground.

Guthrie's earnings for 1946, his last full year as an engineer, were $5,169.92. After his injuries, and before trial, wage increases actually made for men in his position would have increased his earnings by one-third, thus making them $6,893. Appellant argues that in any calculation of loss of earnings we must throw out the amounts to be paid in taxes, in other words, confine his loss to his reasonably to be expected "take-home" pay. Counsel for Guthrie challenge this, as they say the amount of taxes is purely speculative, and cite Stokes v. United States (2 Cir.), 144 F.2d 82, which

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the view of the operators of the locomotive until he was run over, "you cannot find that the operators of the locomotive were negligent because they did not see Guthrie until after he was run over, if that is the fact," suggests what was said in Union Pacific R. R. Co. v. Hadley, 246 U.S. 330, 332, as follows: "On the question of its negligence the defendant undertook to split up the charge into items mentioned in the declaration as constituent elements and to ask a ruling as to each. But the whole may be no greater than the sum of its parts, and the Court was justified in leaving the general question to the jury if it thought that the defendant should not be allowed to take the bundle apart and break the sticks separately, and if the defendant's conduct viewed as a whole warranted a finding of neglect."

Appellant asked for an instruction No. 36, as follows: "If plaintiff Guthrie was experienced in, and familiar with, the work he was doing and knew and appreciated normal risks and hazards which attend it, including chance of injury from geeting his foot caught in a switch in front of an approaching train, defendant Southern Pacific was not required to take steps to protect him against such of those risks and hazards as did not result from its negligence, which were normal and customary risks and hazards of the employment, which were known to, and appreciated by, him and which he himself could have avoided by exercising reasonable care for his own safety." We think that since the decision in Tiller v. Atlantic Coast Line R. Co., 318 U.S. 54, a court would do well to avoid the giving of such an instruction which squints in the direction of assumption of risk.

seems to support them. We think, however, that for the expected period of Guthrie's life, he would have found taxes fully as certain as his prospect of continued earnings.[7] In 1946 his net taxes were $524.90. We think that the record will not establish a possible loss of earnings in excess of $6,000 per year after taxes.

Whether that possible loss is reasonably probable must depend upon whether Guthrie's disability is total. There is also controversy as to whether loss of earnings can be said to relate to a period after Guthrie would have reached 70, when the rules of his employer would require his retirement. We think the prospect of a continuance of employment after 70, and after compulsory retirement from employment by the Southern Pacific, too remote to enter calculations here. And for similar reasons we think the jury would be warranted in believing that the prospect of a man past 59, with but one leg, getting a job in the labor market in competition with younger and able-bodied men, was equally remote.

Computed at 3 per cent[8] the present worth of $6,000 a year for eleven years is $55,515.74.[9] This figure is somewhat

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[7]Of course, if Guthrie is awarded a sum as the present worth of his loss of earning capacity, it must be assumed that the income from investments acquired with that sum would be taxable. If estimated tax is properly deducted at one end, it should be added at the other. Since present worth is computed upon the hypothesis of a gradually diminishing principal, the interest of income factor in the amounts consumed each year would not be large, and would not greatly, if at all, exceed his exemptions.

[8]In 1948 the twelve largest life insurance companies in the United States made a return upon their invested funds which on the average (not weighted) was slightly less than 3 per cent. (Best's Life Insurance Reports, 1949 Ed., Alfred M. Best Co. Inc. N.Y.)

[9]9.252624 times the annual sum. Bailey's Tables and Methods, (Times-Mirror Press, Los Angeles).

less than that arrived at by the trial judge, whose opinion stated that the amount would be "between $60,000, and $70,000." Such a figure would be produced if the total earnings of $6,893 were considered, without deduction for taxes.[10] It is apparent that an appraisal of the verdict shows that assuming that the jury correctly appraised the present worth of the loss of earnings, there must have been some $45,000 awarded on account of such items of damage as pain and suffering, inconvenience and disfigurement.

The evidence as to these factors was that Guthrie was hospitalized for 37 days during which he underwent two operations on his stump. In the process of healing a 27 degree contracture of the right thigh developed, so that the stump of his leg extended at an angle which up to the time of trial had prevented him from wearing an artificial limb, and it appeared possible that he would never be able to wear one. He suffered from phantom pain in the cut limb, there was tenderness over the cut end of the sciatic nerve, and the medical testimony was that this phantom pain, a continued constant burning sensation as if he felt his amputated foot, was characteristic of amputees generally, and was real pain, often remaining constant and permanent. Loss of the leg has increased his discomfort in his back, due to a congenital anomaly which previously existed there.

It is common knowledge that for a man of Guthrie's age, aches and pains arising out of physical disabilities do not ordinarily lessen, as they might for a younger man. We do not think it necessary to determine whether the probability of future suffering was proven with the requisite degree of certainty. On the whole the inconvenience, the disfigure-

[10]The figure would be $63,778.33.

ment, and certainly some degree of distress, are shown to be both substantial and permanent. "Insofar as the award of damages to him consists of compensation for pain and suffering it is, obviously, nothing that an appellate court can, or a trial court for that matter, measure by a yardstick as to whether the jury has given too much or too little."[11] The same is true with respect to the elements of inconvenience and disfigurement. And in comparing the amount here awarded with amounts previously held by the courts to be excessive, we are bound to consider "the century's continued depreciation of the purchasing value of the dollar, with the extraordinary acceleration of the rate of decrease of the past decade."[12]

Nevertheless, it is the opinion of the members of this court that the amount of the verdict is too high. What we, as an appellate court, are permitted to do about such a situation, is another matter.

It appears to be generally agreed that when it can be said that the verdict of the jury was the result of passion or prejudice, it is the duty of the appellate court to set aside the verdict and grant a new trial. Southern Pac. Co. v. Zehnle (9 Cir.), 163 F.2d 453; L. E. Whitham Const. Co. v. Remer (10 Cir.), 105 F.2d 371; American Ice Co. v. Moorehead (C.A.D.C.), 66 F.2d 792. In such a case a new trial must be ordered,—the error cannot be cured by a remittitur. Minneapolis, etc., Ry. v. Moquin, 283 U.S. 520. Some authorities hold that passion and prejudice may not be inferred from the mere excessiveness of the verdict,

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[11]Scott v. Baltimore & O. R. Co. (3 Cir.), 151 F.2d, 61, 64.

[12]Southern Pacific Co. v. Zehnle, (9 Cir.), 163 F.2d 453, 454. See also, "Fluctuating Dollars and Tort Damage Verdicts," 48 Columbia Law Review, p. 264, footnote 1.

proof of appeals to passion and prejudice not appearing in the record. Larsen v. Chicago & N. W. R. Co. (7 Cir.), 171 F.2d 841, 845.[13] As to this, we need not express any opinion for the reason that in our view there is nothing in this case, either in the size of the verdict or otherwise, sufficient to establish the existence of passion or prejudice.

There is an abundance of authority in the decisions of the federal courts that in this situation an appellate court has no power to do anything about such a verdict. The view most commonly expressed is that stated by Judge Goodrich, for the Court of Appeals of the Third Circuit, in Scott v. Baltimore & O. R. Co., supra, as follows: "The members of the Court think the verdict is too high. But they also feel very clear that there is nothing the Court can do about it. . . ." "A long list of cases in the federal courts demonstrates clearly that the federal appellate courts, including the Supreme Court, will not review a judgment for excessiveness of damages even in the cases where the amount of damage is capable of much more precise ascertainment than it is in a personal injury case."

The cases in accord, cited in the margin of that court's opinion, could be multiplied.[14]

Most of the cases so holding cite Southern Ry. Co. v. Bennett, 233 U.S. 80, in which it was said: (P. 87) "It may be admitted that if it were true that the excess appeared as a

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[13]Cf. Kurn v. Stanfield (8 Cir.), 111 F.2d 469. See "Correction of Damage Verdicts by Remittitur and Additur," 44 Yale Law Journal 318; cases cited in note 18, p. 321.

[14]Some of these cases, more recent than Scott v. Baltimore & O. R. Co., supra, are Feltman v. Sammond (C.A.D.C.), 166 F.2d 213; Reid v. Nelson (5 Cir.), 154 F.2d 724; Chicago & N. W. Ry. Co. v. Green (8 Cir.), 164 F.2d 55; Herzig v. Swift & Co. (2 Cir.), 154 F.2d 64.

matter of law; that if, for instance, the statute fixed a maximum and the verdict exceeded it, a question might arise for this court. But a case of mere excess upon the evidence is a matter to be dealt with by the trial court. It does not present a question for re-examination here upon a writ of error." On the other hand, in Cobb v. Lepisto, 6 F.2d 128, this court remanded a case with directions to order a new trial unless an excess amount, stated by this court, were remitted. In Department of Water & Power v. Anderson, 95 F.2d 577, while finding the verdict there in question not to be "grossly excessive," this court stated the rule of Cobb v. Lepisto to be as follows (P. 586): "Although it was held in Southern Ry. Co. v. Montgomery (5 Cir.), 46 F.2d 990, 991, that a Circuit Court of Appeals has 'no jurisdiction to correct a verdict because it is excessive,' the rule in this court is that the refusal to grant a new trial is 'such an abuse of discretion as is reviewable by this court' where the verdict is 'grossly excessive'." In Virginian Ry. Co. v. Armentrout, 166 F.2d 400, the Court of Appeals for the Fourth Circuit, reversed the judgment and ordered a new trial in a personal injury case because of its determination that the verdict was excessive notwithstanding the trial judge had denied a motion for new trial made upon this ground. The court cited Cobb v. Lepisto, supra, with approval and said: "To the federal trial judge, the law gives ample power to see that justice is done in causes pending before him; and the responsibility attendant upon such power is his in full measure. While according due respect to the findings of the jury, he should not hestitate to set aside their verdict and grant a new trial in any case where the ends of justice so require. . . .

"The power of this court to reverse the trial court for failure to exercise the power, where such failure, as here, amounts to an abuse of discretion, is likewise clear. . . .[15]

The writer of this opinion thinks that this court should remand this case with directions to grant a new trial unless the appellee shall file his consent in writing to remit from the judgment now entered the sum of $20,000 together with all interest, if any, which may have accrued upon the amount so remitted. Neither the industry of counsel nor our own research has been able to turn up any case of any appellate court where a verdict anywhere near so high as that rendered here has been upheld as compensation for comparable injuries. Cobb v. Lepisto, supra, as well as Estabrook v. Butte Anaconda & Pacific Ry. Co. (9 Cir.),

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[15]Cobb v. Lepisto, supra, prior to the decision in Virginian Ry. Co. v. Armentrout, supra, has been stated to stand alone. (See Miller v. Maryland Casualty Co., 40 F.2d 463. Cf. Fairmount Glass Works v. Coal Co., 287 U.S. 474, footnote 14, p. 485). It dealt with a verdict in an action to recover the value of services rendered, something more readily calculated than the compensation for pain, suffering, and the like.

Southern Railway Co. v. Bennett, supra, and the earlier cases asserting want of power to review the action of the trial court in denying a new trial on the ground of excessiveness of the verdict, were explained by Judge Learned Hand in Miller v. Maryland Casualty Co., 40 F.2d 463. The rule is there said to be based upon a procedural difficulty in that historically the writ of error did not afford review of the trial court's action upon a motion for a new trial, and it was said that the appeal later provided for was subject to the same limitations. Subsequently in Fairmount Glass Works v. Coal Co., 287 U.S. 474, 482, the Supreme Court expressly referred to the decision in Miller v. Maryland, supra, saying: "It has been suggested that a review must be denied because of the historical limitation of the writ of error to matters within the record of which the motion for a new trial was not a part. Compare Judge Learned Hand in Miller v. Maryland Casualty Co., 40 F.2d 463. But the denial of review can no longer rest upon this ground, since the record before the appellate court has been enlarged to include in the bill of exceptions a motion for a new trial made either before or after judgment."

163 F.2d 781, in which a new trial was ordered because of inadequate damages, had fixed the rule of this circuit as one sustaining the power of a federal appellate court to review the trial court's action in a case of this kind. He thinks this power should be exercised here independently of the fact that the defect in the charge mentioned in note 5, supra, probably accounts for the excessive verdict; that this defect furnishes a special additional reason for holding the court's refusal to set aside the verdict as an abuse of discretion and that the defective instruction may be taken into consideration in this connection notwithstanding appellant's failure to make specific objection to the charge on this ground. He is of the opinion that a disclaimer of appellate power such as that stated in Scott v. Baltimore & O. R. Co., supra, is a manifestation of a momentum generated in the earlier cases, and not yet arrested simply because the courts expressing this doctrine have failed to note that the procedural obstacles which originally prevented appellate review no longer exist, as was stated in the Fairmount Glass Works case, supra, note 15.[16] In his opinion the doctrine of impotence expressed in the cases mentioned is due for a general overhauling and he thinks that the decision of Judge Parker in Virginian Railway Co. v. Armentrout, supra, points to the reasons why this

[16]Rule 75 of the Rules of Civil Procedure relating to the record on appeal, is even more inclusive than the bill of exceptions referred to in the Fairmount Glass Works case. In the field of criminal appeals the Supreme Court in Griffin v. United States, 336 U.S. 704, noted no procedural difficulty in reviewing the trial court's action upon a motion for a new trial notwithstanding the earlier disclaimers of authority in cases such as Blitz v. U. S., 153 U.S. 308. Cf. National Bank of Commerce v. U. S. (9 Cir.), 224 F. 679, 683. The rational explanation is to be found in Rule 39b F.R.Crim.P. incorporating the rules and practice governing civil appeals.

court should not abdicate the power which it has previously asserted in Cobb v. Lepisto, supra, and Department of Water & Power v. Anderson, supra.[17]

The majority of the court, however, do not agree with what has been stated in the preceding paragraph. They find it unnecessary to express any opinion here as to whether, in a case of this kind, this court may not, under any circumstances, review the action of the trial court upon an application for a new trial because of the alleged excessiveness of the verdict. The court cannot say that the verdict here is so large that the refusal of the trial court to grant a new trial, or to condition a denial of a new trial on a remittitur, can be called an abuse of discretion. The majority of the court think the amount of this verdict left it within the area of the trial court's discretion.

Finally, error is assigned because Guthrie was permitted to testify that on another railroad, the Texas and Pacific, employees are permitted to work beyond age 70. It is sufficient to say that we think the admission of that evidence could not have been prejudicial. Katalla Co. v. Rones (9 Cir.), 186 F. 30, 35.

The judgment is affirmed.

(Endorsed:) Opinion. Filed Dec. 30, 1949. Paul P. O'Brien, Clerk.

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[17]Cf. Pacific Greyhound Lines v. Rumeh, our No. 12237, decided December 19, 1949, in which this court considered at length the question whether the verdicts there were excessive [178 F.2d 652].

In the United States Court of Appeals for the Ninth Circuit

SOUTHERN PACIFIC COMPANY, a corporation, *Appellant,* vs. GARRY T. GUTHRIE, *Appellee.*	No. 12,164 Jan. 15, 1951

OPINION

Appeal from the United States District Court for the Northern District of California, Southern Division Upon Rehearing.

Before the Court sitting in bank.

POPE, Circuit Judge.

After our decision in Southern Pacific Company v. Guthrie, 180 F.2d 295, we granted a rehearing limited to the questions "whether the damages are excessive, and if so, what the action of the court should be." The argument upon rehearing was before the court sitting in bank.

The facts relating to the character and extent of Guthrie's injuries, and his loss of prospective earnings, are stated in the former opinion. There the court attempted to arrive at a conclusion as to the limit of permissible award

for the loss of expected earnings. It is apparent that this item of pecuniary loss is much more susceptible of calculation than those items of damages coming within the description of pain, suffering, inconvenience and disfigurement. In order properly to appraise the verdict, the court, in the earlier opinion, undertook to discover the maximum possible allowance for the loss of earnings, assuming that the balance of the total verdict must be charged to the non-pecuniary losses, pain, suffering, etc.

In attempting to evaluate the evidence as to the damage resulting from lost earnings we found ourselves compelled to deal with a record devoid of evidence as to the probable present worth of the lost earnings. Thus, there was no evidence such as the cost of an annuity which would be a substantial equivalent of the lost earnings. Hence the court was obliged, as we are now, to refer to matters which we may notice judicially, such as the probable rate of interest available from safe investments. It should be understood that none of the factors which are thus considered are absolute. The previous conclusions as to present worth of the prospective earnings, were necessarily arrived at by a consideration not only of Guthrie's life expectancy but also of the earning power of money. There is of course no rule of law which determines the probable rate of interest obtainable upon investments in safe securities.

Both parties have pressed us with considerations which, they say, should alter these conclusions. Such are, whether expected gross earnings must be calculated without regard to probable tax deductions; whether we should assume an expectation of earning beyond the age of compulsory retirement enforced by this employer; and, whether we should

assume that Guthrie is not totally disabled to earn money in the future. In the former opinion the court expressed the view that due regard for the principle of compensation required recognition that a plaintiff should not be in a better position financially than he would have been if he had continued to work and that, hence some consideration of tax deductions is proper; that the earning power of money should be calculated at not less than 3 per cent;[1] that there is no justification for speculating either that Guthrie would be able to earn money, or that his employment would have continued beyond age 70 had his injuries not occurred. It was thought that the evidence did not disclose a pecuniary loss in excess of the present worth, calculated at 3%, of $6000 a year for eleven years. Calculated exactly, this was $55,515.74. The members of the court agreed that the balance of the verdict amount, some $45,000, as an award for such items of damage as pain and suffering, inconvenience and disfigurement, was "too high." They differed as to whether this court should direct a remittitur.

We are now persuaded that the figure $55,515.74 should be enlarged, somewhat, and in two respects. We previously assumed Guthrie a man "past 59." Actually, he was two months less than 59, and therefore "past 58." Our calculation of eleven years' earnings was somewhat less than it should have been, although the difference would extend to no more than two months' earnings. We also considered that calculation should be based on no more than $6000 a year,

[1]The requested instruction approved in Gulf, C. & S. F. Ry. v. Moser, 275 U.S. 133, 135, referred to "the highest net rate of interest." The most recent opinion on the question of an appropriate interest is Virginian Ry. Co. v. Armentrout (4 Cir.), 166 F.2d 400, 407, which called 3% interest "a conservative estimate of return."

because of necessary tax deductions. We think the court's view that the net take home pay, after taxes, would represent the actual loss, is correct; but we are now convinced that we cannot tell how much this would be. Under the tax law then in force, he could look forward to an additional exemption after age 65, and because he was married, the split income features of the law would give two additional exemptions when his wife reached 65, something about which we cannot tell. All we do know is that in 1946, his income tax on $5,165.92 was $724 less a "rebate" of "around $200."

In the nature of such a case there is bound to be some uncertainty, even as to such pecuniary matters as future earnings. What Guthrie's ultimate earnings, net or gross, would be, cannot be foretold. While it may be prophesied that during his lifetime income taxes will continue, there is not equal certainty as to their impact on him. In Chicago and N.W. Ry. Co. v. Curl, 178 F.2d 497, 502, the court held it not prejudicial error to refuse evidence of the amount of income tax and other deductions, because of the inherent uncertainty in such matters, saying, "We may assume that the jury were aware of * * * the fact that the average earnings, net or gross, of the appellee for the future could not be definitely known."

As was said in the former opinion, if no account were taken of an income tax deduction, the present worth of Guthrie's lost earnings for eleven years would amount, under the method of calculation employed by the court, to $63,778.33. Because of the uncertainties mentioned, it can be said that the maximum present worth shown was somewhere between that figure and the $55,515.74 pre-

viously mentioned. Under the circumstances, we cannot assume that the trial court was wrong in stating that the figure exceeded $60,000.

It thus appears that the jury must be held to have awarded some $40,000 for the non-pecuniary damages. With respect to that award the members of this court as now constituted are in agreement, as was the court on the former hearing, on two preliminary conclusions.

The first of these is that the verdict was too high.

The second is that there is no basis for any claim that the verdict was given under the influence of passion or prejudice. The record contains no proof of any appeals to passion and prejudice, which, under some authorities, would be essential before such a conclusion could be reached. Larsen v. Chicago & N.W. R. Co., (7 Cir.), 171 F.2d 841, 845. And even if an imputation of passion and prejudice could arise from the mere size of a verdict, this one does not fall into any such category.

We are now confronted with two arguments with respect to our power and duty in these circumstances. On behalf of Guthrie it is argued that since showing of passion or prejudice is absent, even although we consider the verdict too high, regardless of what may be the rule in the state courts, we, as a federal appellate court, are without power to require a new trial even if we find the verdict excessive; and since we cannot direct a new trial, we cannot condition a denial of a new trial upon a remittitur. And, notwithstanding this court did just that in Cobb v. Lepisto, 6 F.2d 128, an impressive list of cases is cited by appellee in support of his position. Among these cases is Scott v. Baltimore & O.R. Co., (3 Cir.), 151 F.2d 61, where the court said

at p. 64: "The members of the court think the verdict is too high. But they also feel very clear that there is nothing the Court can do about it. * * * A long list of cases in the federal courts demonstrates clearly that the federal appellate courts, including the Supreme Court, will not review a judgment for excessiveness of damages even in cases where the amount of damage is capable of much more precise ascertainment than it is in a personal injury case."[2]

On the other hand this court cannot ignore its own decision in Cobb v. Lepisto, supra. Of the rule in that case, this court said in Department of Water & Power of City of Los Angeles v. Anderson, 95 F.2d 577: "Although it was held in Southern Ry. Co. v. Montgomery, 5 cir., 46 F.2d 990, 991, that a Circuit Court of Appeals has 'no jurisdiction to correct a verdict because it is excessive,' the rule in this court is that the refusal to grant a new trial is 'such an abuse of discretion as is reviewable by this court' where the verdict is 'grossly excessive'."[3]

More recently the Court of Appeals for the Fourth Circuit, in Virginian Ry. Co. v. Armentrout, 166 F.2d 400, 4 A.L.R.2d 1064, expressly approved and followed Cobb v. Lepisto. There the trial judge had denied a motion for new trial made on the ground that the verdict was excessive. The judgment was reversed and a new trial ordered because of the appellate court's determination that the verdict was so excessive that the court's failure to set it aside

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[2]In addition to the cases there cited are the following, to the same effect: Feltman v. Sammond, 82 U.S. App. D.C. 404, 166 F.2d 213; Reid v. Nelson (5 Cir.), 154 F.2d 724; Chicago & N. W. Ry. Co. v. Green (8 Cir.), 164 F.2d 55; Herzig v. Swift & Co. (2 Cir.), 154 F.2d 64.

[3]In the Department of Water & Power case, supra, the court found the verdict not to be "grossly excessive."

constituted an abuse of discretion. The court said: "To the federal trial judge, the law gives ample power to see that justice is done in causes pending before him; and the responsibility attendant upon such power is his in full measure. While according due respect to the findings of the jury, he should not hesitate to set aside their verdict and grant a new trial in any case where the ends of justice so require. * * * The power of this court to reverse the trial court for failure to exercise the power, where such failure, as here amounts to an abuse of discretion, is likewise clear. * * *"

The rule there stated cannot be reconciled with that of Scott v. Baltimore & O. R. Co., supra, and the cases cited therein, and in note 2 supra.

We are urged to repudiate the rule of Cobb v. Lepisto, and to adopt that followed in the group of cases last mentioned. Our power to review the action of the trial judge is challenged and denied.

If we were to agree with the position thus taken by appellee, it is obvious that we could place a period to this opinion at this point. We do not do so, for two reasons. The first is, that as we shall show more fully hereafter, we find it unnecessary, for the purpose of arriving at a decision herein, to determine whether Cobb v. Lepisto should be repudiated. The second reason is, that we are far from satisfied that the contrary decisions are right, but think the present trend of authoritative decision is in the direction of the rule in our Cobb v. Lepisto case.

The rule stated in Scott v. Baltimore & O. R.R. Co., supra, and the cases cited therein, found expression in early decisions of the Supreme Court. Thus, in New York, Lake Erie

& Western Railroad Company v. Winter, 143 U.S. 60, it was said: "Whether the verdict was excessive, is not our province to determine on this writ of error. The correction of that error, if there were any, lay with the court below upon a motion for a new trial, the granting or refusal of which is not assignable for error here."

Substantially the same language was used in Southern Railway Co. v. Bennett (1914), 233 U.S. 80, 87. These early cases are explained by Judge Learned Hand in Miller v. Maryland Casualty Co. (1930), 40 F.2d 463. The rule is there said to be based upon a procedural difficulty in that historically the writ of error did not afford review of the trial court's action upon a motion for a new trial, and it was said that the appeal later provided for was subject to the same limitations.[4] Subsequently, in Fairmount Glass Works v. Coal Co., 287 U.S. 474, 482, the Supreme Court expressly referred to the decision in Miller v. Maryland, supra, saying: "It has been suggested that a review must be denied because of the historical limitation of the writ of error to matters within the record of which the motion for

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[4] "That it might be desirable to give such an appeal we do not deny. The direction of, or refusal to direct, a verdict is reviewable, and the question which arises is precisely the same as that upon a motion for a new trial, as the Supreme Court has declared again and again. Gunning v. Cooley, 281 U.S. 90, 50 S.Ct. 231, 74 L.Ed. ..... The Seventh Amendment is no bar to this, nor is it to the trial judge's 're-examination' of the damages. It is only a procedural difficulty that prevents our review; that is, that the court's action must of necessity await the verdict. That may not be a good reason, when the matter is of substance, but Congress has been consciously conservative. The Act of April 26, 1928 (28 U.S.C.A. § 861b) expressly confined the newly given appeal by all the statutes previously regulating the old writ of error, among others by those defining the relief which may be had." Miller v. Maryland Casualty Co., supra, p. 465.

a new trial was not a part. Compare Judge Learned Hand in Miller v. Maryland Casualty Co., 40 F.2d 463. But the denial of review can no longer rest upon this ground, since the record before the appellate court has been enlarged to include in the bill of exceptions a motion for a new trial, made either before or after judgment." In that case it was argued that the action of the trial court in denying a new trial could be reviewed as an abuse of the trial court's discretion. There a verdict for $1.00 had been returned in a case where, it was said, substantial damages were recoverable if any recovery was had. The court held that the verdict might be explained as a finding of the issues for the defendant. It was pointed out that the court of appeals had not declared that the trial judge abused his discretion and the court said: "Whether refusal to set aside a verdict for failure to award substantial damages may ever be reviewed on the ground that the trial judge abused his discretion, we have no occasion to determine."

We take this to mean that the Supreme Court in that case intended to leave open the question whether the trial court's refusal to set aside a verdict for excessive or inadequate damages could be reviewed on the ground that the trial judge abused his discretion. The court definitely established that the procedural difficulties mentioned by Judge Hand which had led to the decisions in the earlier cases denying the possibility of review no longer existed.

Today, under the rules which determine the make-up of the record on appeal, there is even less reason for asserting the continuance of these procedural limitations. Rule 75 of the Rules of Civil Procedure, relating to the record on appeal, is even more inclusive than the bill of excep-

tions referred to in the Fairmount Glass Works case, supra.[5]

Since the decision in the Fairmount Glass Works case, supra, it could not be said that there was any fixed rule that an appellate court might not review on appeal from the judgment, an order made upon motion for a new trial, where review is for an error of law. The impact of that decision was promptly recognized in a considerable number of cases including Pettingill v. Fuller, (2 cir.), 107 F.2d 933;[6] Bass v. B. & O. R. R. Co., (7 Cir.) 142 F.2d 779, 780; and General American Life Ins. Co. v. Central Nat. Bank, (6 cir.) 136 F.2d 821. Cf. United States v. Hayes, (9 cir), 172 F.2d 677, 679. In Dimick v. Schiedt, 293 U.S. 474, in

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[5]It is interesting to note what the adoption of Rules of Procedure has done to the older limitations upon appeals in criminal cases. In National Bank of Commerce v. United States, 224 F. 679, 683, this court said: "No error is assignable from a denial of a motion for a new trial. Pickett v. United States, 216 U.S. 456. And that the motion is based upon newly discovered evidence does not constitute an exception. Holmgren v. United States, 217 U.S. 509, 521." Rule 39b F.R. Crim.P. provides: "The rules and practice governing the preparation and form of the record on appeal in civil actions shall apply to the record on appeal in all criminal proceedings, except as otherwise provided in these rules." And under Rule 33 a motion for a new trial on the ground of newly discovered evidence may be made within two years after final judgment. In Griffin v. United States, 336 U.S. 704, decided April 25, 1949, the Supreme Court mentioned no procedural difficulty in an appeal from the denial of a motion for new trial on the ground of evidence discovered after conviction, or in reviewing the action of the trial court upon such an appeal. This is a long move from Blitz v. United States, 153 U.S. 308, where the court said: (p. 312) "We had supposed that it was well understood by the bar that the refusal of a court of the United States to grant a new trial cannot be reviewed upon writ of error."

[6]"In spite of the fact that the courts of the United States have been most loath to review orders granting or denying motions to set aside verdicts, it is implicit in the opinion of Justice Brandeis in Fairmount Glass Works v. Cub Fork Coal Co., 287 U.S. 474, 483-486, 53 S.Ct. 252, 77 L.Ed. 439, that they may do so in certain cases, one of which would seem to be an abuse of the trial judge's discretion." (p. 936)

which the court held that the trial court might not deny a new trial on condition that defendant consent to an "additur," the court was in fact reviewing, for error of law, the order denying a new trial.

Title 28, §2106, was apparently phrased in a manner designed to express the presently recognized freedom of the appellate courts from the type of procedural limitations referred to in the Miller case, supra. "The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree or order, or require such further proceedings to be had as may be just under the circumstances."[7]

Even if there had been any previous reason for doubt on this question, it would seem to have been put to rest by the statement of the Supreme Court in Affolder v. New York, Chicago & St. L. R. Co., 339 U.S. 96, decided after this court's former opinion in this case. There at page 101, the court said of the claimed excessiveness of the verdict: "We agree with the Court of Appeals that the amount of damages awarded by the District Court's judgment is not monstrous in the circumstances of this case." This language would be without point unless the Supreme Court was of the opinion that it might do something about the excessiveness of the verdict if its amount could be called

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[7]For cases which infer from the provisions of Rule 59(d) requiring a specification of the grounds of the order, a right of review of an order granting a new trial, see Freid v. McGrath (C.A.D.C.), 133 F.2d 350, and Youdan v. Majestic Hotel, Etc., Corp. (7 Cir.), 125 F.2d 15.

"monstrous." This is not, we think, substantially different from our statement in the Department of Water & Power case, supra, that "the rule in this court is that the refusal to grant a new trial is such an abuse of discretion as is reviewable by this court where the verdict is 'grossly excessive.'"

The statement made by the Supreme Court in the Affolder case has been drawn in question by the court whose decision was there reviewed. In St. Louis Southwestern Ry. Co. v. Ferguson, (8 cir.) 182 F.2d 949, the court suggests that the language used by the Supreme Court discloses a mistaken assumption as to what the Court of Appeals had held. With apparent reluctance it recognized the possibility that the rule was as stated in the Affolder case, saying: "It may be that a change in the rule is desirable, to allow a general review of the question of excessiveness, such as is the practice in many state appellate courts, or with a more restrained sense of responsibility, perhaps, to permit judgment to be passed upon whether there has been an abuse of discretion by the trial court in refusing to set aside a verdict on motion for new trial." (p. 955)

For the reasons previously stated, we think, contrary to what the Court of Appeals for the Eighth Circuit implied, that what as said in the Affolder case was foreshadowed in the Fairmount Glass Works case. In the face of this statement in the Affolder case we are not prepared to withdraw what this court said in Cobb v. Lepisto.

But, even if it be the rule that we possess the power, in certain cases, to review the action of the trial court upon motion for new trial based on the size of the verdict, that power is not co-extensive with the area in which the trial

court may act. We put to one side those cases in which it can be demonstrated that the verdict includes amounts allowed for items of claimed damage of which no evidence whatever was produced. Such total want of evidence upon a portion of the case would give rise to a question of law in the same manner in which a question of law is presented when, upon motion for a directed verdict, there appears an insufficiency of evidence as to the whole case.[8] There is no such want of evidence here.

It is also clear that we may review the denial of motion for a new trial "if the trial court erroneously excluded from consideration matters which were appropriate to a decision on the motion * * * or if it acted on the mistaken view that there was no authority to grant it on the ground advanced." Fairmount Glass Works v. Coal Co., supra; United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 247; Montgomery Ward & Co. v. Duncan, 311 U.S. 243.

It is urged that such is the case here,—that the refusal to grant a new trial involved an error in point of law because the trial judge, in making his ruling, made legal errors in evaluating the evidence of damages. It is said that the court, in ruling on the motion, applied an incorrect measure of damages, in that its conclusion that the loss of future earnings could amount to as much as $70,000 could only be arrived at by wholly disregarding probable income

[8]Cf. Campbell v. American Foreign S.S. Corporation (2 Cir.), 116 F.2d 926, 928: "No physician predicted that the plaintiff would be incapacitated for three years beyond the date of trial . . . The medical testimony is too indefinite to justify a verdict based on an award of maintenance at $2.50 for a term of three years . . . The other grounds advanced by the defendant for reversal are not substantiated, but because the evidence is insufficient to sustain either the jury's verdict of $5,500 or the reduced verdict directed by the court, the judgment is reversed and the cause remanded for a new trial on the cure and maintenance count."

tax deductions, or by calculating present worth by assuming too low an interest rate, or by indulging both such assumptions.[9]

It is said this resembles those cases in which judgment has been reversed for denial of new trial where the record proceeded upon an erroneous hypothesis. Felton v. Spiro, (6 cir.) 78 F.576. It is said the same was true in Virginian Ry. Co. v. Armentrout, supra, where the opinion of the trial court disclosed a calculation based on an interest rate, and an assumption of lessening of income tax which the appellate court thought not warranted. It is therefore argued that in eliminating consideration of the item of income tax the case is within the statement in the Fairmount Glass Works case, supra, that "its denial may be reviewed if the trial court erroneously excluded from consideration matters which were appropriate to a decision on the motion." We think that the record will not support this argument, for we find nothing in the court's order, wherein its reasons were set forth, which discloses any such error of law. We find nothing to show that the court either ignored the income tax deductions, or adopted an erroneous rate of interest in making its calculations or that it acted upon any other error of law, unless it can be said that the verdict was so "monstrous" or so "grossly excessive" that we should reverse the trial court's refusal to set it aside as an abuse of discretion.

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[9]In denying a new trial the court said: "The verdict of $100,000 damages was large. But not so large as to shock the court's sense of justice. True, it is larger than I might have awarded. On that ground, however, I may not set it aside." After referring to the nature of the injuries the court wene on to say: "Present value of loss of future earnings is substantial—between $60,000 and $70,000. The amount of general damage rested in the discretion of the jury. In that domain, reasonable minds could differ."

When the trial court is presented with a motion for a new trial grounded on a claim of an excessive verdict its power to deal with the motion is not limited to questions of law. The same power and duty which the trial judge has to set aside any verdict and grant a new trial when he is of the opinion the verdict is against the weight of evidence,[10] is that which the trial court frequently exercises in ordering a new trial, or in conditioning denial of a new trial on a remittitur because, in the opinion of the court, the amount of the verdict is against the weight of the evidence. But this power and duty belongs exclusively to the trial judge. It is not for us to give directions in such a case, even although he may have declined to take action, such as we consider we would have done had we been in his place. United States v. Socony-Vacuum Oil Co., supra.[11]

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[10] "On such a motion it is the duty of the judge to set aside the verdict and grant a new trial, if he is of opinion that the verdict is against the clear weight of the evidence, or is based upon evidence which is false, or will result in a miscarriage of justice, even though there may be substantial evidence which would prevent the direction of a verdict. The exercise of this power is not in derogation of the right of trial by jury but is one of the historic safeguards of that right." Aetna Casualty & Surety Co. v. Yeatts (4 Cir.), 122 F.2d 350, 352. See the opinion of Taft, Jr., in Felton v. Spiro (6 Cir.), 78 F. 576, and Montgomery Ward & Co. v. Duncan, 311 U.S. 243, 251.

[11] Necessarily juries are often without means of determining the reasonable limits for their verdicts. The victim of an excessive verdict, not the result of passion or prejudice, and not "monstrous" or "grossly excessive," is entitled to relief at the hands of the trial judge. The power of the judge to grant such relief is an essential part of "trial by jury" under our system. As stated in Capital Traction Co. v. Hof, 174 U.S. 1, 13: " 'Trial by jury,' in the primary and usual sense of the term at the common law and in the American constitutions, is not merely a trial by a jury of twelve men before an officer vested with authority to cause them to be summoned and empanelled, to administer oaths to them and to the constable in charge, and to enter judgment and issue execution on their verdict; but it is a trial by a jury of twelve men, in the pres-

We are convinced that even if we assume, as we do, that Cobb v. Lepisto, supra, and Virginian Ry. Co. v. Armentrout, supra, were correctly decided, we cannot here reverse the action of the trial court unless the verdict can be said to be "grossly excessive," or as stated in the Affolder case, "monstrous." We think that the verdict in this case cannot be so characterized.

The judgment is affirmed.

BONE, Circuit Judge, concurring:

I agree that the judgment in this case should be affirmed but I think that we should also specifically overrule our Lepisto case. The doctrine of that old case lacks support in pronouncements of the Supreme Court and only one Circuit seems to have relied on it as authority for the principle that a federal appellate court may arbitrarily reduce the size of a verdict merely because it regards it as excessive.

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ence and under the superintendence of a judge empowered to instruct them on the law and to advise them on the facts, and (except on acquittal of a criminal charge) *to set aside their verdict if in his opinion it is against the law or the evidence.*" (Emphasis ours)

That it is the duty, as well as within the power of the trial judge to correct an injustice in such cases, was indicated by Judge Parker in adding italics to the following quotation found in Aetna Casualty & Surety Co. v. Yeatts, supra, note 10: "The matter was well put by Mr. Justice Mitchell, speaking for the Supreme Court of Pennsylvania in Smith v. Times Publishing Co., 178 Pa. 481, 36 A. 298, as follows: 'The authority of the common pleas in the control and revision of excessive verdicts through the means of new trials was firmly settled in England before the foundation of this colony, and has always existed here without challenge under any of our constitutions. It is a power to examine the whole case on the law and the evidence, with a view to securing a result, not merely legal, but also not manifestly against justice,—a power exercised in pursuance of a sound judicial discretion, *without which the jury system would be a capricious and intolerable tyranny*, which no people could long endure. This court has had occasion more than once recently to say that it was *a power the courts ought to exercise unflinchingly.*' "

DENMAN, Chief Judge, dissenting:

I dissent. The court's opinion holds that a wrong was done the appellant, in that the verdict is for more money than it owes the appellee. That the amount is *substantially* more than appellant should pay we are agreed. To say that such a substantial sum is not *grossly* excessive and hence deny appellate relief is to me a technical mockery of that justice which we are required to give a litigant by provisions of 28 U.S.C. 2106. That section reads: "The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree or order, or require such further proceedings to be had as may be just under the circumstances."

To me it seems no exaggeration to apply the term "monstrous" to such a concept of American justice. To put it otherwise, there is no more reason not to set aside a finding of the amount of damages in a verdict which the evidence shows is substantially larger than the actual damage, than there is not to set aside a verdict because the finding of negligence has no substantial support in the evidence.

From our conference it is clear that we can agree on a minimum sum to be remitted from the verdict as a condition for not requiring a new trial. That we should have done.

STEPHENS, Circuit Judgs, dissenting.

I dissent. There can be no monetary figure which really compensates for the loss of a limb and for the pain and

suffering, both past and in the future, deriving therefrom. And we must view this case from the standpoint of compensation and not from any standpoint of punishment or resentment against the defendant or from sympathy for the plaintiff. While I fully realize the touchiness of a court's interference with a jury's judgment, I cannot believe that our system of jurisprudence places everybody's material fortune, such as our free enterprise enables us to accumulate, at the unbridled whim of any twelve men and women no matter how good and true they may be. There must be some semblence of a basis for estimating the sum of money which one causing an injury must be compelled to pay to put the injured party in as good a fortune as he could be expected to be in had he not suffered the injury, plus, of course, a generous sum for pain and suffering.

Without such a basis reasonably applied I believe no judgment can validly stand. I cannot go along with the so-called "Monstrous" doctrine. It seems to me that by adopting it we give up all attempt to square the judgment with a reasonable basis for its support. I would think a million dollar judgment for the loss of a little finger would be monstrous (though I have none to sell at that figure) but I don't know about a fifty thousand or twenty-five thousand dollar judgment. No injured person has the right to go to court for sympathy money—all the sympathy in the world is due the plaintiff herein but he is not craving sympathy.

Without an award for pure sympathy or from a corporation prejudice, I cannot figure more than sixty or seventy thousand dollars as justifiable in this case upon any jury instruction setting out a reasonable basis for measurement.

Judge Mathews concurs in the dissenting opinions of Chief Judge Denman and Circuit Judge Stephens.

(Endorsed:) Opinion, Concurring Opinion and Dissenting Opinions. Filed Jan. 15, 1951. Paul P. O'Brien, Clerk.

In the District Court of the United States,
Northern District of California, Southern Division

No. 28,106-G

GARRY T. GUTHRIE,
Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY,
a corporation,
Defendant.

ORDER DENYING MOTION FOR NEW TRIAL

I am of the opinion that I fairly and properly instructed the jury in this case.

The jury could well have concluded from the evidence that plaintiff's injury was proximately caused by negligence of defendant and the crew of the locomotive which ran over and cut off plaintiff's leg, and, further, that plaintiff was himself free of any contributory negligence.

The verdict of $100,000 damages was large. But not so large as to shock the court's sense of justice. True, it is larger that I might have awarded. On that ground, how-

ever, I may not set it aside. Jones v. Atlantic Refining Co., 55 Fed. Supp. 17; Delaney v. New York Central R. R. Co., 68 Fed. Supp. 70.

Plaintiff was a 58 year old locomotive engineer with a working lifetime of railroad experience. He had a working expectancy of 12 years and a life expectancy of 15 years. His leg amputated between knee and thigh was fully incapacitating. It may be fairly concluded from the evidence that, while there might be a possibility in the future of using an artificial limb, physical conditions indicate such possibility to be most uncertain and even remote. Present value of loss of future earnings is substantial—between $60,000 and $70,000. The amount of general damage rested in the discretion of the jury. In that domain, reasonable minds could differ.

For these reasons, the motion for new trial and for a different judgment is denied.

Dated: January 5, 1949.

/s/ Louis E. Goodman,
United States District Judge

[Endorsed]: Filed Jan. 5, 1949.

APPENDIX B

Statutes

FEDERAL EMPLOYERS' LIABILITY ACT

§ 1. "Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of

the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent on such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

"Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter." Apr. 22, 1908, c. 149, § 1, 35 Stat. 65; Aug. 11, 1939, c. 685, § 1, 53 Stat. 1404; 45 U.S.C.A. § 51.

§ 3. "In all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: *Provided,* That no such employee who may be injured or killed shall be held to have been guilty of contrib-

utory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee." Apr. 22, 1908, c. 149, § 3, 35 Stat. 66; 45 U.S.C.A. § 53.

§ 4. "That in any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier; and no employee shall be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee." Apr. 22, 1908, c. 149, § 4, 35 Stat. 66; Aug. 11, 1939, c. 685, § 1, 53 Stat. 1404; 45 U.S.C.A. § 54.

JUDICIARY AND JUDICIAL PROCEDURE

§ 2106. "The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances." 28 U.S.C.A. § 2106.

APPENDIX C

State Workmen's Compensation Statutes—Disability Ratings

Disability ratings under state workmen's compensation statutes are likely to be higher than the facts warrant on a full compensation basis for the reason that the rating, by and large, is only for the purpose of determining what compensation shall be paid based on maximums which are lower than earnings and earning capacity (see table below). The disability ratings do, however, reflect comparative judgments, i.e., clearly indicate that loss of a leg is considerably less than total disability or loss of an arm.

We list here the situation in the state and United States compensation statutes, showing the maximum, what is allowed for an arm (at shoulder) and for a leg, indicating that the disability rating for a leg is measurably lower than for total disability and lower than for loss of the major arm (in almost every instance).

In each instance, the rating is stated in the number of weeks for which compensation is payable. These figures are taken from United States Department of Labor Bulletin No. 125 (1950), "State Workmen's Compensation Laws as of September 1950."

State	Maximum Percentage of Wages	Maximum Period	Arm (at Shoulder)	Leg
Alabama	65	400 weeks	200	175
Arizona	65	Life	260	217
Arkansas	65	450 weeks	240	175
California	61¾	Life	220	200
Colorado	50	Life	208	208
Connecticut	50	624 weeks	275	208
Delaware	60	Period of disability	220	220
District of Columbia	66⅔	Period of disability	280	248
Florida	60	350 weeks	200	200
Georgia	50	350 weeks	200	175
Hawaii	66⅔	Period of disability	280	248

State	Maximum Percentage of Wages	Maximum Period	Arm (at Shoulder)	Leg
Idaho	60	400 weeks; thereafter $8 per week for life.	240	180
Illinois	65	Life	225	190
Indiana	55	500 weeks	250	200
Iowa	60	400 weeks	225	200
Kansas	60	416 weeks	210	200
Kentucky	65	520 weeks	200	200
Louisiana	65	400 weeks	200	175
Maine	66⅔	500 weeks	150	150
Maryland	66⅔	Period of disability	212	212
Massachusetts	66⅔	Period of disability	—	—
Michigan	66⅔	750 weeks	250	200
Minnesota	66⅔	Period of disability	200	200
Mississippi	66⅔	450 weeks	200	175
Missouri	66⅔	300 weeks; thereafter 25 percent of wages for life, maximum $18, minimum $8.	232	207
Montana	66⅔	500 weeks	250	250
Nebraska	66⅔	300 weeks; thereafter 45 percent of wages for life, maximum $16, minimum $8 (or actual wages, if less).	225	215
Nevada	70	Life	260	217
New Hampshire	66⅔	300 weeks	170	170
New Jersey	66⅔	450 weeks	300	275
New Mexico	60	550 weeks	180	180
New York	66⅔	Life	312	288
North Carolina	60	400 weeks; 590 weeks for 2 injuries in the same employment.	220	200
North Dakota	66⅔	Life	234	234
Ohio	66⅔	Life	225	200
Oklahoma	66⅔	500 weeks	250	175
Oregon	—	Life	350	274
Pennsylvania	66⅔	500 weeks	215	215
Puerto Rico	50	340 weeks	300	275
Rhode Island	60	1,000 weeks	300	300
South Carolina	60	500 weeks	200	175
South Dakota	55	300 weeks, thereafter 20 percent of earnings for life, minimum $5, maximum $10.	200	160
Tennessee	60	550 weeks, but during period in excess of 400 weeks, compensation exceeding $8 a week is reduced to $8.	200	175

State	Maximum Percentage of Wages	Maximum Period	Arm (at Shoulder)	Leg
Texas	60	401 weeks	200	200
Utah	60	260 weeks, thereafter 45 percent of wages during disability.	200	180
Vermont	50	260 weeks	170	170
Virginia	60	500 weeks	200	175
Washington	—	Life	—	—
West Virginia	66⅔	Life	240	240
Wisconsin	70	Life	500	500
Wyoming	—		—	—
United States:				
Civil Employees	75	Life	312	288
Longshoremen	66⅔	Period of disability	280	248

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1950

No. 579

SOUTHERN PACIFIC COMPANY (a corporation),
Petitioner,

vs.

GARRY T. GUTHRIE,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

INTRODUCTION.

To the Honorable Fred M. Vinson, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Respondent contends that the Petition for a Writ of Certiorari should be denied.

The only question to be here considered is whether an appropriate ground exists for the issuance of a Writ of Certiorari. Petitioner has failed to show that the Court below rendered a decision in conflict with the decisions of other Circuits of the United States Courts of Appeals, although it claims that dictum in the opinion on rehearing of the Court below demonstates such variance. Any alleged conflict between the Circuits has been resolved by the decision of this Court in *Affolder v. N. Y., Chicago & St. L. RR.*, 339 U.S. 96, and furthermore, the decision of the Court below was not based on whether it had power to reduce a money judgment but was based on the fact that it refused to disturb the judgment in the instant case because it was neither "monstrous" nor "grossly excessive". Neither does Petitioner show that the Court below so far departed from the accepted and usual norm of judicial proceedings as to call for an exercise of this Court's power of supervision, nor does it show that an unique question is involved.

This Court, on the question of granting or refusing certiorari, is not interested in dictum, but only on the importance of the issue actually decided. This Petition for Certiorari is merely an attempt to have this Honorable Court review the two decisions of the Court below affirming a judgment on a verdict for damages for personal injuries and to review the order of the trial judge denying a new trial on the single issue of the alleged excessiveness of the verdict.

STATEMENT OF THE CASE.

The action herein, based on negligence of Petitioner, was brought under the provisions of the Federal Employers' Liability Act (45 U.S.C.A. 51) in the United States District Court for the Northern District of California, Southern Division, and tried before a jury, which returned a verdict for Respondent for $100,000.00.

Respondent, an engineer, was run over by a locomotive of Petitioner, through its negligence, on October 27, 1947, and lost his right leg above the knee. At the time of his injuries, Respondent was 58 years and ten months old (R. 164). A contracture of twenty-seven degrees developed in the remainder of his right leg so that the stump of his leg extended at an angle which prevented him from wearing an artificial leg, and it appeared probable that he would never be able to wear one (R. 230-231).

The Court of Appeals for the Ninth Circuit, in its opinion on rehearing (R. 380), computed the present value of loss of future earnings as being between a maximum of $63,778.33 and a minimum of $55,515.74 (R. 384).[1]

We deem it unnecessary to further burden this Court with the facts, as they are accurately stated in the decisions of the Court of Appeals, on both the appeal and the rehearing. (R. 352 and 380).

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[1]The United States Court of Appeals for the Ninth Circuit, in its opinion on rehearing, said: "Under the circumstances, we cannot assume that the trial judge was wrong in stating that the figure exceeded $60,000.00". (R. 384.)

THE DECISIONS BY THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT ON ORIGINAL APPEAL AND REHEARING.

In the original decision on appeal, the Court of Appeals for the Ninth Circuit in its opinion in 180 F. (2d) 295 (R. 352), found that there was nothing in the case sufficient to establish the existence of passion or prejudice (R. 377), and further found that it was unnecessary to express any opinion as to whether the Court may or may not, under the circumstances, review the action of the trial court in denying a motion for a new trial on the ground of alleged excessiveness of the verdict (R. 377). The Court below further stated in said opinion that it could not say that the verdict is so large that the refusal of the trial judge to grant a new trial, or to condition a denial of a new trial on a remittitur, could be called an abuse of discretion. The majority of the Court thought the amount of the verdict left it within the area of the trial Court's discretion (R. 377).

Petitioner, in its petition for a rehearing, raised the issue as to the power of the Court below to review the decision of the trial Court in denying a motion for a new trial made on the ground of excessive damages. The Court below granted a rehearing limited to the question "whether the damages are excessive, and, if so, what the action of the Court should be?"

The Court below, on the rehearing, again affirmed the judgment and held that the trial judge, in his order denying a new trial, committed neither error of law nor abuse of discretion (R. 395-396). The Court

below, in its decision on rehearing, further stated that the amount of damages could not be characterized as "monstrous" or "grossly excessive" and quoted therein the decision of this Court in *Affolder v. N.Y., Chicago & St. L. RR. Co.*, supra, (R. 398).

ARGUMENT.

Petitioner is correct in its statement that this Court does not sit to write academic essays but to decide concrete cases. Yet, by its petition, it is asking this Honorable Court to do just that when it poses the question, have federal appellate courts the power to reverse a judgment and order a new trial absolutely or conditionally, where the jury has awarded an amount which is grossly excessive or monstrous? (P. 13). Such a question is purely academic, because the decisions of the Court below, both on direct appeal and on rehearing, and the order of the trial judge denying a new trial (R. 71) all have expressly found that the amount of the verdict in this case is neither monstrous nor grossly excessive, and the Court below has twice affirmed the judgment. Petitioner, furthermore, has requested this Court to review an alleged conflict between the United States Courts of Appeals in various circuits concerning Appellate Court power to reverse or grant a new trial, absolutely or conditionally. Any such alleged conflict is not involved here, as the Court of Appeals, in both its decision on appeal and on rehearing, has stated that it believes it has the power to reduce a

damage judgment after a denial of a motion for a new trial on that ground, when it is grossly excessive or monstrous, but it specifically found in this particular case that the judgment was not in those categories (R. 398). In fact, said Court, in its opinion on the rehearing herein, relied on the opinion of this Court in the case of *Affolder v. N.Y., Chicago & St. L. RR. Co.*, supra, and held that, unless there was an error of law or an abuse of legal discretion by the trial court, which, incidentally, is not found here, it would not disturb the judgment on the verdict unless it was monstrous or grossly excessive. The majority decision stated "that the verdict in this case cannot be so characterized" (R. 398).

The *Affolder* case, indeed, is now controlling in all the circuits and there is, therefore, no such conflict between the circuits as alleged by Petitioner. As stated above, the alleged conflict, even if it had not been determined by this Court in the *Affolder* case, would have no bearing on the case at bar, because the Court below indicated that it had the power to reduce the judgment if it had found it monstrous or grossly excessive (R. 392).

Incidentally, the Court below in the instant case followed the reasoning of this Court in the *Affolder* case, as likewise did the Appellate Court in *St. Louis Southwestern Ry. Co. v. Ferguson,* (8 Cir.) 182 F. (2d) 949, cited by Petitioner, inasmuch as both Courts realized they had the right to reduce a damage judgment which was monstrous or grossly excessive. How-

ever, each Court found that the judgments in the particular cases before them were not monstrous or grossly excessive and on that ground only, refused to reduce the judgments.

The gist of Respondent's position in opposition to this Petition for a Writ of Certiorari is that the Supreme Court and the Courts of Appeals, on the question of claimed excessiveness of a verdict for damages, should neither reverse, nor grant a new trial, either absolutely or conditionally, if the trial judge has denied a new trial, unless the record clearly discloses prejudicial errors of law, abuse of legal discretion, passion or prejudice, or that the verdict was monstrous or grossly excessive.

Affolder v. N.Y., Chicago & St. L. RR. Co., supra;

Southern Ry. Co. v. Bennett, 233 U.S. 80 at 87;

Fairmount Glass Works v. Coal Co., 287 U.S. 474 at 482.

The Court below, on rehearing, found it unnecessary in arriving at a decision to determine whether or not it had power to reduce a damage judgment (R. 387). As dictum, it stated that it did have such power where the record indicated an abuse of legal discretion by the trial judge, in denying a motion for a new trial, or where the record indicated that the amount of the judgment was monstrous or grossly excessive. The Court specifically found herein that the judgment was neither grossly excessive nor monstrous (R. 398), and that the record did not indicate any error of law

by the trial judge, and, therefore, affirmed the judgment.

The question posed by Petitioner as to the powers of the Court below is, therefore, moot.

CONCLUSION.

The decision of the Court of Appeals herein, on rehearing, is correctly based upon the opinion of this Court in the *Affolder* case.

It is, therefore, respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Dated, San Francisco, California,
March 21, 1951.

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